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Nos. 11, 58, 66, 67, and 71

In the Supreme Court of the United States

OCTOBER TERM, 1962

JOHN THOMAS AVENT, ET AL., PETITIONERS

v.

STATE OF NORTH CAROLINA

RUDOLPH LOMBARD, ET AL., PETITIONERS

v.

STATE OF LOUISIANA

JAMES GOBER, ET AL., PETITIONERS

v.

CITY OF BIRMINGHAM

F. L. SHUTTLESWORTH, ET AL., PETITIONERS

v.

CITY OF BIRMINGHAM

JAMES RICHARD PETERSON, ET AL., PETITIONERS

v.

CITY OF GREENVILLE

ON WRITS OF CERTIORARI TO THE SUPREME COURTS OF NORTH CAROLINA, LOUISIANA, AND SOUTH CAROLINA, AND TO THE COURT OF APPEALS OF ALABAMA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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No. 11

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BRIEF FOR THE UNITED STATES AS AMICUS CURIAE [1]

OPINIONS BELOW

The opinion of the Supreme Court of North Carolina in *Avent* (A. 72–90) [2] is reported at 253 N.C. 580, 118 S.E. 2d 47.

The opinion of the Supreme Court of Louisiana in *Lombard* (L. 141–151) is reported at 241 La. 958, 132 So. 2d 860. The opinion of the Criminal District Court of Orleans Parish overruling petitioners' motion to quash (L. 28–86) is not reported.

The opinion and orders of the Alabama Court of Appeals (G. 57–64, 88, 124, 144, 178, 194, 220, 236, 262, 278) and the orders of the Supreme Court of Alabama (G. 69, 92, 128, 144, 182, 194, 224, 236, 266, 278) in *Gober* are reported, *inter alia*, at 133 So. 2d 697–708.

The opinions of the Alabama Court of Appeals (S. 42–44, 67) and the orders of the Supreme Court of Alabama (S. 46, 69) in *Shuttlesworth* are reported at 134 So. 2d 213.

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[1] This brief will not consider *Wright* v. *Georgia*, No. 68. Since that case involves arrests for unlawfully assembling on *municipal* property, it does not present the paramount issue considered in the cases discussed in this brief as to the rights of private businesses to exclude Negroes from all or a portion of their premises. We believe, however, that the convictions in *Wright* should be reversed for reasons advanced by the petitioners in that case. The United States, as *amicus curiae*, is filing a separate brief in *Griffin* v. *Maryland*, No. 26, this Term.

[2] The records in *Avent* v. *North Carolina*, No. 11, *Lombard* v. *Louisiana*, No. 58, *Gober* v. *Birmingham*, No. 66, *Shuttlesworth* v. *Birmingham*, No. 67, and *Peterson* v. *Greenville*, No. 71, are referred to as "A.," "L.," "G.," "S.," and "P.," respectively.

The opinion of the Supreme Court of South Carolina in *Peterson* (P. 55–59) is reported at 122 S.E. 2d 826. The opinion of the Greenville County Court (P. 50–52) is not reported.

JURISDICTION

The judgment of the Supreme Court of North Carolina in *Avent* was entered on January 20, 1961 (A. 90).

The judgment of the Supreme Court of Louisiana in *Lombard* was entered on June 29, 1961 (L. 149).

The judgments of the Alabama Court of Appeals in *Gober* were entered on May 30, 1961 (G. 57, 88, 124, 144, 178, 194, 220, 236, 262, 278). Petitions to the Supreme Court of Alabama for writs of certiorari were denied on September 14, 1961 (G. 69, 92, 128, 144, 182, 194, 224, 236, 266, 278); and applications for rehearing were overruled on November 2, 1961 (G. 71, 92, 128, 144, 182, 194, 224, 236, 266, 278.)

The judgments of the Alabama Courts of Appeals in *Shuttlesworth* were entered on May 30, 1961 (S. 43, 66). Application for rehearing before the Court of Appeals of Alabama was denied on June 20, 1961 (S. 45, 68). A petition to the Supreme Court of Alabama for a writ of certiorari was denied on September 25, 1961 (S. 46, 69), and application for rehearing was overruled on November 16, 1961 (S. 51, 74).

The judgment of the Supreme Court of South Carolina in *Peterson* was entered on November 10, 1961 (P. 55), and a petition for rehearing was denied on November 30, 1961 (P. 62).

The petitions for writs of certiorari were granted by this Court on June 25, 1962 (370 U.S. 934–935; A. 92, L. 152, G. 279, S. 75, P. 65). The jurisdiction of this Court rests upon 28 U.S.C. 1257(3).

QUESTIONS PRESENTED

Petitioners are Negroes who were invited into department and variety stores as customers. They were refused service at lunch counters or in lunch rooms under the proprietor's practice of enforcing racial segregation in the store's dining facilities. In Nos. 11, 66, 67 and 71, there was little evidence as to motive, but the proprietor's practice of racial discrimination in fact conformed to current municipal ordinances requiring racial segregation in public eating places. In No. 58, although there was no ordinance specifically requiring segregation in public eating places, the proprietor's practice of racial discrimination knowingly conformed to a current and pervasive State policy of maintaining racial segregation expressed in numerous legislative enactments and official declarations. Petitioners in each case refused to leave the lunch counters or lunch rooms upon being denied service. They were arrested and convicted of criminal trespass or a similar offense.

The questions presented are:

1. Whether, upon the records in Nos. 11, 66, 67 and 71, the convictions are sufficiently related to the ordinances requiring racial segregation that they should be set aside on the ground that they result from a denial of equal protection of the laws in violation of the Fourteenth Amendment.

2. Whether, upon the record in No. 58, the convictions are sufficiently related to the State laws and policies maintaining racial segregation that they should be set aside on the ground that they result from a denial of equal protection of the laws in violation of the Fourteenth Amendment.

INTEREST OF THE UNITED STATES

The fundamental constitutional issue in these cases is to what extent the Fourteenth Amendment condemns, as a denial of equal protection of the laws, enforcement by the States of racial segregation in private businesses open to the general public. This problem involves not only the power of the States but also the constitutional rights of millions of American citizens. On the one hand, millions of Negroes (as well as some other groups) are subjected to racial discrimination in private businesses open to the public. The "sit-in" activities resulting in petitioners' convictions were part of a widespread peaceful protest against this practice. Petitioners claim that the involvement of the States in their convictions violates the equal protection clause of the Fourteenth Amendment. On the other hand, the respondents invoke both the power of the States to preserve order, and also the freedom and responsibility of individuals to make their own decisions concerning the use of private property and choice of associates. Thus, the basic issue in these cases involves the competing claims of large numbers of citizens, and of the States, and is of grave importance to the country as a whole.

The petitions for certiorari in each of these cases urge various grounds for reversal. Since the primary interest of the United States is in the fundamental question which is described above, we will confine this brief on behalf of the United States to a discussion of that question.

STATEMENT[3]

1. AVENT V. STATE OF NORTH CAROLINA, NO. 11

a. Statutes Involved.—Chapter 13, Section 42, of the Code of Durham, North Carolina (1947), provides:

> In all licensed restaurants, public eating places and 'weenie shops' where persons of the white and colored races are permitted to be served with, and eat food, and are allowed to congregate, there shall be provided separate rooms for the separate accommodation of each race. The partition between such rooms shall be constructed of wood, plaster or brick or like material, and shall reach from floor to the ceiling. Any person violating this section shall, upon conviction, pay a fine of ten dollars and each day's violation thereof shall constitute a separate and distinct offense.

Petitioners were convicted of violating Section 14–134 of the North Carolina General Statutes, which provides:

> *Trespass on land after being forbidden.* If any person after being forbidden to do so, shall go or enter upon the lands of another, without a license therefor, he shall be guilty of a misdemeanor and on conviction, shall be fined not

[3] We have set forth fully only the facts of each of the cases that may be relevant to the legal issues that we consider in this brief.

exceeding fifty dollars or imprisoned not more than thirty days * * *.

b. The Facts.—On May 6, 1960, petitioners, five Negro students from North Carolina College and two white students from Duke University, both of which are in Durham, North Carolina, entered Kress' Department Store in Durham (A. 1, 2, 4, 5, 6, 8, 9, 35). On the two selling floors of the store, there are approximately fifty counters (including a "standup" lunch counter) which serve Negroes and whites without racial distinction (A. 21, 22). No sign at the store's entrance barred or conditioned Negro patronage (A. 22). Petitioners made various purchases, as some of them had in the past, and eventually went to the basement lunch counter (A. 21, 35, 39, 41, 43, 46, 47, 48).[4] There a sign stated "Invited Guests and Employees Only" (A. 23). The manager testified that, although no invitations as such were sent out, white persons automatically were considered guests; Negroes, and whites accompanied by Negroes, were not

[4] Petitioners were participants in an informal student organization which opposed racial segregation. They believed that they had a right to service at Kress' basement lunch counter after having been customers in other departments (A. 36, 40, 44–45). Some had previously picketed the store to protest its policy of welcoming Negroes' business while refusing them lunch counter service (A. 41, 43, 46, 48, 49). Some of the petitioners had requested and had been denied service on previous occasions at Kress' lunch counter (A. 37). Some of the petitioners testified that they expected to be served at the basement lunch counter because they had been served upstairs (A. 39, 48, 49). Various petitioners testified that they did not expect to be arrested for trespassing on this occasion (A. 37, 38, 41, 43, 48, 49).

(A. 21–23).[5] The counter was separated from other departments by an iron railing (A. 21). The store manager testified that the entrances to the counter were chained, but petitioner Streeter denied this (A. 21, 37).

The manager declined to serve the students and asked them to leave (A. 21). He stated that if Negroes wanted service they might obtain it at a stand-up counter upstairs (A. 22). The manager then called the police (A. 21). After being asked by the police officers to leave, petitioners persisted in their refusal and were arrested for trespass (A. 21, 24–25).[6]

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[5] The manager testified that "the luncheonette was open for the purpose of serving customers food. Customers on that date were invited guests and employees" (A. 21). He testified further that "We had signs all over the luncheonette to the effect that it was open for employees and invited guests. Mr. Pearson [petitioners' Negro attorney], I do not consider you an invited guest, under the circumstances right now. I do consider Mr. Murdock [the State Solicitor] an invited guest under the circumstances" (A. 22). He also testified: "I would serve this young lady (indicating the white female defendant), but I asked her to leave when she gave her food to a Negro. She was my invited guest at that time, up until the time that I asked her to leave" (A. 23).

Portions of the record suggest that the police were already present at the time the manager first asked the students to leave (A. 35, 40, 42, 44, 47, 48). For example, petitioner Phillips testified that "When I took a seat at the lunch counter, I was approached by Mr. W. K. Boger, who said, 'You are not an invited guest, and you are not an employee; so I am asking you to leave.' Before I could ask him who he was, the police officer directed me to the back of the store" (A. 40).

[6] It is not clear whether, after the arrival of the police officer, the manager again asked petitioners to leave (compare A. 21 with A. 24–25).

Petitioner Nelson, one of the white students, was asked to leave after she offered food to Negroes. The manager told her

The Kress manager explained his refusal to serve the students at the trial (A. 22–23):

> * * * It is the policy of our store to wait on customers dependent upon the customs of the community. * * * It is the policy of our store to operate all counters in the interest of the customs of the community. * * * In the interest of public safety it is our policy to refuse to serve Negroes at the luncheonette downstairs in our seating arrangements. It is also the policy of Kress to refuse the patronage of white people in the company of Negroes at that counter. Even if Negroes accompanied by white people were orderly at our luncheonette because of the policy of the community we would not serve them, and that was our policy prior to May 6, 1960. * * * It is not the custom of the community to serve Negroes in the basement luncheonette, and that is why we put up the signs, "Invited Guests and Employees Only."

Petitioners were indicted in the Superior Court of Durham County, the indictments stating that each petitioner (A. 1–10):

> with force and arms, * * * did unlawfully, willfully, and intentionally after being forbidden to do so, enter upon the land and tenement of S. H. Kress and Co. store * * * said S. H. Kress and Co., owner, being then and there in actual and peaceable possession of said premises, under the control of its manager and

---

that she was "antagonizing the customers" (A. 42). Petitioner Brown was told by the manager that "[t]he custom has not been changed, and you will have to leave" (A. 44).

> agent, W. K. Boger, who had, as agent and manager, the authority to exercise his control over said premises, and said [petitioner] after being ordered by said W. K. Boger, agent and manager of said owner, S. H. Kress and Co., to leave that part of the said store reserved for employees and invited guests, willfully and unlawfully refused to do so knowing or having reason to know that * * * [petitioner] had no license therefor, against the form of the statute in such case made and provided and against the peace and dignity of the state.[7]

Petitioners pleaded not guilty and were tried by a jury on June 30 and July 1, 1960 (A. 15–16). The jury returned a verdict of guilty (A. 16). Three of the petitioners received thirty-day sentences; one received a twenty-day sentence, one received a fifteen-day sentence, and, in two cases, sentence was continued for two years (A. 16–20).

On January 20, 1961, the Supreme Court of North Carolina affirmed the convictions (A. 73). In a lengthy opinion, the court emphasized that (A. 78):

> No statute of North Carolina requires the exclusion of Negroes and of White people in company with Negroes from restaurants,[8] and no statute in this State forbids discrimination by the owner of a restaurant of people on account of race or color, or of White people in company with Negroes. In the absence of a statute for-

[7] The indictments of all the petitioners carried a racial designation, *viz.*, "CM," "WM" "CF," and "WF" (A. 2, 3, 5, 6, 7, 9, 10).

[8] A municipal ordinance in Durham, however, does require segregation in restaurants. See *supra*, p. 6.

bidding discrimination based on race or color in restaurants, the rule is well established that an operator of a privately owned restaurant privately operated in a privately owned building has the right to select the clientele he will serve, and to make such selection based on color, race, or White people in company with Negroes or vice versa, if he so desires. He is not an innkeeper. This is the common law. * * *

2. LOMBARD V. STATE OF LOUISIANA, NO. 58

a. Statute Involved.—The Louisiana statute under which petitioners were convicted is La. R.S. 14:59(6), as amended 1960, which provides:

> Criminal mischief is the intentional performance of any of the following acts:
>
> * * * * * *
>
> (6) Taking temporary possession of any part or parts of a place of business, or remaining in a place of business after the person in charge of such business or portion of such business has ordered such person to leave the premises and to desist from the temporary possession of any part or parts of such business.

The statute states that "[w]hoever commits the crime of criminal mischief shall be fined not more than $500.00, or imprisoned for not more than one year, or both."

b. The Facts.—On September 10, 1960, one week prior to the "sit-in" demonstration out of which this case arose, a group of Negroes conducted at Woolworth's Department Store in New Orleans, Louisiana, the first "sit-in" demonstration to occur in that city. On the same day, the New Orleans Superintendent of

Police issued the following statement, which was published in the New Orleans *Times-Picayune* (L. 17, 139–140):

> The regrettable sit-in activity today at the lunch counter of a Canal St. chain store by several young white and Negro persons causes me to issue this statement to the citizens of New Orleans.
>
> We urge every adult and juvenile to read this statement carefully, completely and calmly.
>
> First, it is important that all citizens of our community understand that this sit-in demonstration was initiated by a very small group.
>
> We firmly believe that they do not reflect the sentiments of the great majority of responsible citizens, both white and Negro, who make up our population.
>
> We believe it is most important that the mature responsible citizens of both races in this city understand that and that they continue the exercise of sound, individual judgment, goodwill and a sense of personal and community responsibility.
>
> Members of both the white and Negro groups in New Orleans for the most part are aware of the individual's obligation for good conduct—an obligation both to himself and to his community. With the exercise of continued, responsible law-abiding conduct by all persons, we see no reason for any change whatever in the normal, good race-relations that have traditionally existed in New Orleans.
>
> At the same time we wish to say to every adult and juvenile in this city that the police department intends to maintain peace and order.

> No one should have any concern or question over either the intent or the ability of this department to keep and preserve peace and order.
>
> As part of its regular operating program, the New Orleans police department is prepared to take prompt and effective action against any person or group who disturbs the peace or creates disorder on public or private property.
>
> We wish to urge the parents of both white and Negro students who participated in today's sit-in demonstration to urge upon these young people that such actions are not in the community interest.
>
> Finally, we want everyone to fully understand that the police department and its personnel is ready and able to enforce the laws of the city of New Orleans and the state of Louisiana.[*]

On September 13, 1960, four days prior to the "sit-in" demonstration out of which this case arose, Mayor DeLesseps Morrison also issued a statement which was printed in the *Times-Picayune*. The Mayor said (L. 14, 15, 138–139):

> I have today directed the superintendent of police that no additional sit-in demonstrations or so-called peaceful picketing outside retail stores by sit-in demonstrators or their sympathizers will be permitted.
>
> The police department, in my judgment, has handled the initial sit-in demonstration Friday

[*] At the trial of the petitioners in *Lombard*, the Superintendent of Police testified that the reason for his statement was that he "was hoping that situations of this kind would not come up in the future to provoke any disorder of any kind in the community" (L. 17).

and the follow-up picketing activity Saturday in an efficient and creditable manner. This is in keeping with the oft-announced policy of the New Orleans city government that peace and order in our city will be preserved.

I have carefully reviewed the reports of these two initial demonstrations by a small group of misguided white and Negro students, or former students. It is my considered opinion that regardless of the avowed purpose or intent of the participants, the effect of such demonstrations is not in the public interest of this community.

Act 70 of the 1960 Legislative session redefines disturbing the peace to include "the commission of any act as would foreseeably disturb or alarm the public."

Act 70 also provides that persons who seek to prevent prospective customers from entering private premises to transact business shall be guilty of disorderly conduct and disturbing the peace.

Act 80—obstructing public passages—provides that "no person shall wilfully obstruct the free, convenient, and normal use of any public sidewalk, street, highway, road, bridge, alley or other passage way or the entrance, corridor or passage of any public building, structure, water craft or ferry by impeding, hindering, stifling, retarding or restraining traffic or passage thereon or therein."

It is my determination that the community interest, the public safety, and the economic welfare of this city require that such demon-

strations cease and that henceforth they be prohibited by the police department.[10]

On September 17, 1960 (one week after the Superintendent's statement and four days after the Mayor's statement), the petitioners here, three Negroes and one white person, sat down at counter seats at the white refreshment counter at McCrory's Five and Ten Cents Store in New Orleans. McCrory's, which "caters to the general public," is a branch of a national chain doing business in thirty-four states (L. 19).

Although no sign indicated any racial restriction as to service, the counter where petitioners sat had been restricted to white patronage since 1938 (L. 105, 110). The counter manager (Mr. Graves) advised petitioners that he could not serve them there and that

[10] The Mayor testified at petitioners' trial that the superintendent of police "serves under [the Mayor's] direction," and that "[i]t is the policy of my office and that of the City Government to set the line or direction of policy to the police department" (L. 13). The Mayor further testified that his statement was issued "following the initial sit-in and follow-up demonstration the next day, I believe by picketing in the same area, and I outlined to the police department and the community the two acts of the Legislature 70 and 80 which dealt with this matter and gave the reasons in the public interest that we should carry out the intent and purpose of the law" (L. 14). He testified that his statement "encompasse[d] any laws covering questions of disturbing the peace, of public acts which would create a disturbance or confusion, disturbances of the peace, and specifically quoted these two acts because they are of recent nature and somewhat specific in regard to the question, but I have a feeling that matters of this kind, when persons engage in this type of demonstration as a natural consequence will create disturbances of the peace and in many cases set off chain reactions that can be much more serious" (L. 16).

they could be served at a colored counter in the rear of the store (L. 105, 110). The petitioners made no reply (L. 105). Although petitioners were not creating a disturbance or doing anything except sitting at the counter (L. 108), Mr. Graves closed the counter because Negroes were present (L. 105, 108). Petitioners nonetheless remained seated. The police were called by store personnel (L. 107), and the store manager, Mr. Barrett, arrived (L. 112). Shortly thereafter several police officers arrived (L. 112). Mr. Barrett informed the police that he wanted the Negroes to leave, but an officer informed him that he must request them to leave in the presence of the police (L. 126). The police then witnessed Mr. Barrett's request to the petitioners that they leave the counter area (L. 113). When petitioners did not leave, a police officer, Major Reuther, informed them that they were violating the law "and if the manager insisted that they move we would have to put them under arrest" (L. 129). After a short period, the police arrested petitioners (L. 129), who were charged with criminal mischief under La. R.S. 14:59(6), *supra*, p. 10.

Testimony was adduced at a hearing on petitioners' motion to quash the information and at the trial on the merits concerning the reasons that petitioners were not served at the counter. The store manager testified that he exercises discretion as to whether Negroes should be served [11] (L. 21), and that "[t]he policy

[11] Mr. Barrett testified that he was authorized by the "national office" of McCrory's chain to determine the segregation policies of the New Orleans store (L. 21). The trial court

[as to serving Negroes] is determined by local tradition, law and custom, as interpreted by me" (L. 21). The manager testified further that when, as occasionally happened, Negroes sought service at a white lunch counter he "would tell them we had a colored counter in the back, because they might be passing through from the North and not understand Southern customs" (L. 117–118).[12]

When asked whether "in the last 30 to 60 days [he had] entered into any conference with other department store managers here in New Orleans relative to sit-in problems" (L. 22) the manager replied that "[w]e have spoken of it" (L. 23).

Mayor Morrison and the Superintendent of Police testified concerning the custom in New Orleans with respect to segregated eating facilities. The Mayor stated that to his personal knowledge no lunch counter in the city served both Negroes and whites together (L. 15). The Superintendent of Police testified that, in his experience as a member of the police force for fifteen years, and as a resident of New Orleans, he had not known of "any public establishments that cater to both Negroes and whites at the same lunch counter in the city of New Orleans" (L. 18).

The trial court refused to allow a series of questions designed to ascertain whether the manager's decision

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sustained objections to questions designed to reveal the practice of McCrory's stores in other states (L. 19–20, 22) and the power of the national office to overrule a manager's decision (L. 22).

[12] Mr. Barrett also replied "[y]es, sir" to counsel's question whether his decision was based on "state policy and practice and custom in this area" (L. 25).

was dictated or influenced by "state policy." Thus, Mr. Barrett was not permitted to say whether he "discussed methods and means to handle these situations if they arise in any particular department store" (L. 23), although counsel observed that the "purpose of this Your Honor is a question of conformity with state policy" (L. 23). Again, the manager was not allowed to reply to questions as to whether "if the state policy or practice would be different you would exercise your discretion in a different manner" and whether "if there was no custom of segregated lunch counters or no state policy, the general atmosphere would be different, would you allow Negroes to eat at white lunch counters" (L. 25, 26). Similarly, the trial court ruled out a question to Mr. Graves, the counter manager, as to "why [he was] not allowed to serve them," despite counsel's contention that the question was "material, because if Mr. Graves felt there was some state policy that prevented him from serving these defendants this is a clear state action" (L. 109–110).[13]

The trial court also excluded a series of questions designed to ascertain whether the police had been actively involved in the manager's decision to refuse service to petitioners. Captain Cutrera, one of the arresting officers, was not permitted to say whether

[13] Petitioners introduced into evidence a series of bills, some of which were ultimately enacted into law, of the 1960 session of the Louisiana state legislature. Petitioners contended that these bills and statutes (including the criminal mischief statute under which petitioners were convicted) demonstrated a state policy of racial discrimination (see L. 26–27 and the opinion of the Louisiana Supreme Court, quoted *infra*, p. 19).

"there was any plan approved by the police as to what [the store personnel] should do in the event of a sit-in" (L. 127–128). And Mr. Barrett was not allowed to reply to the question whether he had "ever met with members of the New Orleans Police Department and discussed problems of sit-in demonstrations and how you or how they should be handled if they arise in your store?" (L. 23). Similarly, counsel was not allowed to determine whether Mr. Graves had called the police "on his own initiative;" the question was asked in order to learn whether he had "any plan * * * with the police" (L. 107).[14]

Petitioners were convicted of violating the "criminal mischief" law, sentenced to sixty days in jail, and fined $350 each (L. 8). The convictions were affirmed by the Supreme Court of Louisiana. *State* v. *Goldfinch*, 132 So. 2d 860, 241 La. 958 (1961) (L. 141–149). The State Supreme Court rejected the contention that "by content, reference and position of context [the statute] is designed to apply to, and be enforced in an arbitrary manner against, members of the Negro race and those acting in concert with them" (L. 145), stating (L. 145–146):

> * * * In aid of this assertion certain House bills of the Louisiana legislature for 1960, introduced in the same session with the contested statute, were offered in evidence. All of these bills did not become law, but some did. It is declared that this law and the others enacted

[14] Mr. Graves did testify at another point that he had called the police "as a matter of routine procedure," and that he had "no particular plan" for the handling of sit-ins; they were to be handled like any other emergency situation (L. 106).

during the same session were designed to apply to and be enforced against, in an arbitrary manner, members of the Negro race. We have carefully reviewed the provisions of these bills referred to which were enacted into law and nowhere in their content or context do we find that any of them seek to discriminate against any class, group, or race of persons. We therefore find no merit in this contention and, accordingly, dismiss it as being unsupported.

The court also considered the contention that "the action of the manager of McCrory's was provoked or encouraged by the state, its policy, or officers, and * * * that this action of McCrory's was not its own voluntary action, but was influenced by the officers of the state" (L. 146). It held (L. 146–147):

The conclusion contended for is incompatible with the facts. Rather, the testimony supports a finding that the manager of McCrory's had for the past several years refused service to Negroes, that the policy of the store was established by him, that he had set out the policy and followed it consistently; that Negroes had habitually been granted access to only one counter within the store and a deliberately provoked mischief and disturbance such as the one he complained of here had not previously occurred. * * *

Even under the provision of the questioned statute it is apparent that a prosecution is dependent upon the will of the proprietor, for only after he has ordered the intruder to relinquish possession of his place of business does a violation of the statute occur. The state, therefore, without the exercise of the pro-

prietor's will can find no basis under the statute to prosecute.

These facts lead us to the conclusion that the existence of a discriminatory design by the state, its officers or agents, or by its established policy, assuming such could have been shown, would have had no influence upon the actions of McCrory's. The action of bringing about the arrest of the defendants, then, was the independent action of the manager of the privately owned store, uninfluenced by any governmental action, design, or policy—state or municipal—and the arrest was accomplished in keeping with McCrory's business practice established and maintained long before the occasion which defendants seek to associate with a discriminatory design by the state. * * *

The court further held that no constitutional provision prevented a proprietor of a restaurant from refusing service on the basis of race. It said (L. 148):

> The defendants have sought to show through evidence adduced at the trial that there is no integration of the races in eating places in New Orleans and, therefore, the custom of the state is one that supports segregation and hence state action is involved. * * *

In answer to this contention, the court stated that "segregation of the races * * * is not required by any * * * law of the State * * * but is the result of the business choice of the individual proprietors, both white and Negro, catering to the desires and wishes of their customers, regardless of what may stimulate and form the basis of the desires" (L. 148).

3. GOBER V. CITY OF BIRMINGHAM, NO. 66

a. Statutes Involved.—Section 369 of the General City Code of Birmingham, Alabama (1944), provides:

> *Separation of races.*—It shall be unlawful to conduct a restaurant or other place for the serving of food in the city, at which white and colored people are served in the same room, unless such white and colored persons are effectually separated by a solid partition extending from the floor upward to a distance of seven feet or higher, and unless a separate entrance from the street is provided for each compartment.

Petitioners were convicted of violating Section 1436 of the General City Code of Birmingham, Alabama (1944), which provides:

> *After warning.*—Any person who enters into the dwelling house, or goes or remains on the premises of another, after being warned not to do so, shall on conviction, be punished as provided in Section 4, provided, that this Section shall not apply to police officers in the discharge of official duties.

b. The Facts.—This case involves ten different petitioners. On March 31, 1960, the petitioners, in five groups of two, entered five department stores in the City of Birmingham. The facts relating to each of the cases are as follows:

(i) *Gober* and *Davis.*—Petitioners entered Pizitz's Department Store in Birmingham, Alabama (G. 43, 50). Petitioner Davis purchased stocks, toothpaste, and a handkerchief (G. 43). They then proceeded to the mezzanine lunch counter where they attempted to

order, but were ignored by the waitresses (G. 44). Although only white persons were seated at the lunch counter at the time, there was no sign indicating that the counter was reserved for whites (G. 44, 50). Petitioners were approached by Mr. Pizitz, assistant to the president of the store. Pizitz, who did not identify himself to petitioners, told them that Negroes were served elsewhere in the store (G. 23, 44–45). They were not directly asked to leave the store or the area in which they were sitting (G. 45). Mr. Pizitz's conversation with petitioners was described as follows (G. 23–24):

> He asked the defendants to leave the tea room area, told them that they could be served in the Negro restaurant in the basement.
>
> * * * * *
>
> He told them that they couldn't be served there and we had facilities in the basement to serve them. * * * He told them it would be against the law to serve them there. * * *

Mr. Gottlinger, the controller of Pizitz's, testified that no official of Pizitz called the police (G. 26). He also testified that no official of the company filed a complaint (G. 27).

Police Officer Martin of the Birmingham Police made the arrests (G. 19). He had received a report from a superior officer that there was a disturbance at Pizitz's (G. 19). He went to the dining area, found it closed to customers, and saw two Negro men seated and conversing together (G. 18–19). Martin heard no one speak to petitioners (G. 19). Following the direction of his superior, and without

himself warning petitioners, Martin placed them under arrest and charged them with trespassing after warning (G. 20).

(ii) *Hutchinson* and *King*.—Petitioners took seats at tables in the mezzanine dining area at Loveman's Department Store (G. 107, 115). Loveman's is a general department store and invites Negro trade in all departments with the exception of dining facilities (G. 114, 120). The dining room is a concession run by the Price Candy Company but follows Loveman's policies and regulations (G. 114).[15]

Soon after petitioners were seated, Mr. Kidd, a member of the store's protective department, appeared.[16] At the trial, he described what occurred in these terms (G. 115):

> There was two colored boys sitting on the mezzanine and I notified the people who were milling around, I notified all of the people, white people, to leave as we were closing the mezzanine in their presence—I did not directly speak to the two colored boys who were sitting at a table * * *.[17]

Mr. Kidd announced three times that the dining area was closed and put up signs to that effect (G.

[15] Mr. Schmid, the dining area concessionaire, testified that he knew of no dining facilities in Loveman's for Negroes (G. 113–114). However, Mr. Kidd of Loveman's protective department testified that the store did have separate dining facilities for Negroes (G. 119).

[16] Apparently, a restaurant employee called the protective department (G. 112). According to Mr. Schmid, this had been done since, "naturally," there was a "disturbance of the peace" (G. 112). The only actual disturbance described, however, was that "* * * the waiters went off the floor" (G. 112).

[17] Mr. Schmid likewise did not speak to petitioners (G. 116).

116).[18] About forty or fifty people were seated at the time these announcements were made, and some of them apparently stayed and finished their lunches (G. 111).

About twenty-five white patrons were seated when the police arrived, but none were arrested (G. 113).[19]

There is nothing in the record to indicate who called the police.[20] Police officer Martin, who arrested petitioners, had been told by a motorcycle policeman to go to Loveman's (G. 107). At the dining area, he observed a rope tied from one post to another and a sign stating that the area was closed (G. 107). He saw two Negro men at a table but had no conversation with them "other than to tell them they were under arrest" (G. 107). Officer Martin did not know of his own personal knowledge that anyone from Loveman's had asked petitioners to leave but believed that his superior officer knew this (G. 108).[21] Martin

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[18] When asked what caused him to close the lunchroom, Kidd testified: "The commotion that was on the mezzanine. I did not know what was the cause of the commotion. When I began closing the place down then I noticed after the crowd had dispersed that the two colored boys were occupying a table" (G. 117). The commotion Kidd referred to was the people standing up and milling around (G. 117).

[19] Mr. Kidd testified, however, that everyone left immediately when he announced the closing of the lunch-room (G. 118).

[20] Mr. Schmid did not know who called the police and testified that his secretary and cashier had instructions to call the store detective in case of disturbances (G. 112).

[21] Apparently at about the time of the arrest, Police Lieutenant Purvis approached Mr. Schmid and stated that "someone called us that you had two people in here that were trying to be served * * *" (G. 112). Schmid pointed to petitioners (G. 112).

charged petitioners with trespass after warning (G. 109).

(iii) *Parker* and *West*.—Petitioners entered Newberry's, a variety store open to the general public (G. 158, 165). There are two lunch counters in Newberry's for white customers—one on the first floor where these "sit-ins" occurred and one in the basement (G. 163). There is a Negro lunch counter on the fourth floor which has a "for colored only" sign (G. 163, 166).

At least one of the petitioners made purchases of paper and books (G. 170). They then sat at the lunch counter (G. 158–159). No sign at the lunch counter indicated that it was reserved for whites (G. 166, 171). When Mrs. Gibbs, the store detective, saw the petitioners, she (G. 162):

> * * * went over to the lunch counter * * * and identified myself and told them that they would have to leave, they couldn't be served there, but if they would go to the fourth floor we have a snack bar for colored there and they would be served on the fourth floor.

Assistant Store Manager Stallings also spoke with petitioners (G. 164):

> Well I asked them, I said, "You know you can't do this." I said, "We have a lunch counter up on the fourth floor for colored people only. We would appreciate it if you would go up there."

Mr. Stallings did not call the police, did not make a complaint to the police, and did not know whether

anybody else did [22] (G. 165). Police officer Myers was directed by a radio call from police headquarters to proceed to Newberry's (G. 158–159). Myers understood that a fellow officer had received a complaint from a Mr. Stallings, whose capacity at the store—or even whether he was an employee of Newberry's—Myers did not know (G. 160–161). At Newberry's, he encountered something "out of the ordinary," *viz.*, "[t]wo colored males were sitting at the lunch counter" (G. 158). Myers did not speak with petitioners nor did he witness a conversation among petitioners and any store employee (G. 159). Nevertheless, Myers arrested petitioners for trespass after warning.[23]

(iv) *Sanders* and *Westmoreland*.—Petitioners entered the Kress dime store in Birmingham, a general department store soliciting the trade of the general public (G. 214–215). It has no food service facilities for Negroes (G. 215), who are, however, invited to buy food and bakery items to carry out (G. 218). White and Negroes purchase from the same counters at other departments (G. 216).

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[22] Stallings, when asked "Did any other official at Newberry's call the police?," replied: "Someone, now I don't remember who this person was, but someone said to me that we called the police. I don't know who it was. I don't remember that" (G. 165).

[23] Petitioner West testified that when officer Myers arrived on the scene he began to motion white people away from the lunch counter but all of them did not leave (G. 172). "After he started motioning the white people away," West stated, "we started to get up and when we started to get up one got me in the back or somewhere in behind. * * * After I saw him motioning other people up I said, 'Let's go.' And we started to get up" (G. 172).

After petitioners sat down at a bay in the lunch counter, Kress' lunch counter manager told them "we couldn't serve them and they would have to leave" (G. 211). After the manager turned out the lights in the bay in which petitioners were sitting, petitioners moved to another (G. 211). The manager then closed down all the bays and turned out all the lights in the bays (G. 212).

Officer Caldwell, upon receiving a call to go to Kress' store, went to the basement and observed that the lunchroom was closed and "two black males" were "sitting there" (G. 209). The manager then informed the policeman, in the presence of petitioners, that "they couldn't be served and he had turned the lights out and closed the counter" (G. 209).[24] Two policemen entered the bay where petitioners were seated and twice asked them to get up (G. 212). After additional policemen entered, officer Caldwell arrested petitioners, although no one had asked him to do so (G. 209, 210), and the officers escorted petitioners from the store (G. 212).[25]

(v) *Walker* and *Willis*.—Petitioner Walker entered Woolworth's store to purchase handkerchiefs and a birthday gift for a friend (G. 255). Petitioner Willis purchased various non-food items (G. 255).

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[24] The officer did not hear anyone tell petitioners to leave the counter (G. 210). The counter manager had not called the police, requested an arrest or signed a complaint. Nor did the store manager do any of these things in the counter manager's presence (G. 213–214).

[25] A woman already seated at the counter remained after the "closing" and, so far as the counter manager knew, was not arrested (G. 217–218).

They were not refused service at any non-food counter (G. 257–258), and Walker testified that he "really expected service" at the lunch counter because he "had been served prior to coming to the [lunch] counter" (G. 259).

Petitioners proceeded to the lunch counter and sat down (G. 255). There were no signs indicating that the lunch counter was reserved for whites (G. 257). A waitress said to petitioner, "I'm sorry I can't serve you," but they remained seated at the counter (G. 256).

Two police officers arrived in response to a call from the Birmingham police radio (G. 252). Mrs. Evans, the manager of the lunch counter, informed one officer that "she had told the boys to leave, that the place was closed, and the second time she directed her conversation to the defendants and told them it was closed and they would have to leave, she would not serve them" (G. 252–253).[26] Officer Casey testified that no one directly instructed the police to arrest petitioners (G. 253–254), but that he understood Mrs. Evans' "complaint" that "she wanted the boys out of the store" as a request to remove them (G. 253). When asked "did you take it upon yourself to make these arrests," officer Casey replied: "I did under authority of the City of Birmingham" (G. 253).

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[26] This was the testimony of police officer Casey. Petitioner Walker, on the other hand, testified that no one connected with the store management had ever asked petitioners to leave, and that he did not see Mrs. Evans at the store at the time of the incident (G. 256).

Some white customers were ordered to leave the counter, and one was forced to do so by the police but was not arrested (G. 256). Finally a policeman "asked [petitioners] to leave," saying, "Let's go," and informed them that they were under arrest (G. 257). Officer Casey testified that at the time of arrest or shortly thereafter he informed petitioners that they had been arrested for trespass after warning (G. 254).

The complaint against each of the ten petitioners charged that he or she "did go or remain on the premises of another, said premises being the area used for eating, drinking, and dining purposes and located within the building commonly and customarily known as * * * [the store in question] after being warned not to do so, contrary to and in violation of Section 1436 of the General City Code of Birmingham of 1944" (G. 2–3, 73–74, 93, 129, 145, 183, 195–196, 225, 237, 267). Petitioners were convicted in the Recorder's Court of the City of Birmingham. On appeal, they then received successive trials *de novo* in the Circuit Court of Jefferson County with the same judge, prosecutor and defense counsel.

At the first trial (*Gober* and *Davis*), petitioners tried to question a store official concerning the segregation ordinance of the City of Birmingham (Section 369 of the City Code of Birmingham) (G. 24–25):

> Mr. HALL [counsel for petitioners]. * * * It is our theory of this case it is one based simply on the City's segregation ordinance and Mr. Gottlinger, Mr. Pizitz, the police officers and everybody involved acted simply because of the

segregation law and not because it was Pizitz policy.

* * * * *

Mr. HALL. As I understand it it is the theory of the City's case, it is trespass after warning. Our contention is that that is not a fact at all, it is simply an attempt to enforce the segregation ordinance and we are attempting to bring it out.

The COURT. Does the complaint cite some statute?

Mr. HALL. Trespass after warning. If we went only on the complaint it would seem that some private property has been abused by these defendants and that the owner of this property has instituted this prosecution. From the witness' answers it doesn't seem to be the case. It seems it is predicated on the segregation ordinance of the City of Birmingham rather than on the trespass. So what we are trying to bring out is whether or not the acts of Pizitz were based on the segregation ordinance or something that has to do with trespass on the property.

The court refused to permit the store official to be interrogated about his knowledge of the law, on the ground that the reason that the store excluded petitioners was immaterial (G. 25–26). During the *Parker* and *West* trial, petitioners' counsel likewise attempted to establish that petitioners were arrested because of the segregation policies of the City of Birmingham and not because of any policy of the store (G. 166–168). The court again ruled that this line of inquiry was not "competent" (G. 168).

Petitioners were again adjudged guilty in the Circuit Court and, in a common sentencing proceeding, were fined $100 and given thirty days' hard labor, with additional time for failure to pay the fine and court costs[27] (G. 10–11, 82, 101–102, 137–138, 153, 188, 203–204, 230, 245–246, 272). The Alabama Court of Appeals, affirming the conviction, wrote an opinion for the first case, *Gober* v. *State of Alabama,* and affirmed all others in brief *per curiam* orders citing *Gober* (G. 57–64, 88, 124, 144, 178, 194, 220, 236, 262, 278). In its opinion in *Gober,* the Court of Appeals stated that 'there is no question presented in the record before us, by the pleading, of any statute or ordinance requiring the separation of the races in restaurants. The prosecution was for a criminal trespass on private property" (G. 63). The court noted that petitioners were licensees and entered the premises by implied invitation and that, under such circumstances, the owners of the premises had the right to place limitations as they saw fit (G. 63). "It is fundamental," the court held, "and requires no citation of authority, the grantor of a license, which has not become coupled with an interest, may revoke the license at will" (G. 64). The Supreme Court of Alabama denied certiorari in all the cases by identical orders (G. 69, 92, 128, 144, 182, 194, 224, 236, 266, 278).

[27] For example, petitioner Gober was sentenced to 52 days of hard labor for failure to pay his $100 fine and the $5 costs accrued in the Recorder's Court, and to an additional 60 days of hard labor for failure to pay the costs accrued in the Circuit Court. The State of Alabama also was authorized to recover from Gober the costs expended for feeding Gober while he was in jail (G. 11; see also G. 82, 101–102, 137–138, 153, 188, 203–204, 230, 245–246, 272).

4. SHUTTLESWORTH V. CITY OF BIRMINGHAM, NO. 67

a. Statutes involved.—Petitioners were convicted of violating Section 824 of the General City Code of Birmingham, Alabama (1944). Section 824 provides:

> It shall be unlawful for any person to incite, or aid or abet in, the violation of any law or ordinance of the city, or any provision of state law, the violation of which is a misdemeanor.

Sections 369 and 1436 of the Birmingham code, which are also involved, are set forth above at page 22.

b. The Facts.[28]—The record shows that James Gober (one of the petitioners in the *Gober* case (see *supra*, pp. 22-24) went to petitioner Shuttlesworth's home on March 30, 1960 (S. 27-28). Shuttlesworth, his wife, several students from Daniel Payne College, and petitioner Billups, who had driven one of the students to Shuttlesworth's home, were present (S. 28, 31). Petitioner Shuttlesworth "asked for volunteers to participate in the sit down demonstrations" (S. 29). A "list," not otherwise described, was prepared (S. 30). One student "volunteered to go to Pizitz [a department store] at 10:30 [a.m.] [the next day] and take part in the sit down demonstrations" (S. 31). Shuttlesworth "didn't say that he would furnish Counsel but told him or made the announcement at that time that he would get them out of jail" (S. 31-32).

[28] The record of the trial court proceedings in this case consists largely of testimony of a city detective in the Circuit Court of Jefferson County describing the evidence adduced at an earlier trial of petitioner Shuttlesworth for the offense in the city recorder's court. Objections were regularly made to this testimony by the defendants on hearsay grounds (see, *e.g.*, S. 24-25).

Gober and other students present at the meeting did participate in a "sit-in" demonstration, not otherwise described, on the next day, March 31, 1960 (S. 33).

Petitioners Shuttlesworth and Billups were charged with violating Section 824 of the Code of Birmingham, *supra,* by inciting or aiding or abetting "another person to go or remain on the premises of another after being warned not to do so," in violation of Section 1436 of the Birmingham Code, *supra* (S. 2, 53). They were convicted by the city recorder's court. On appeal to the Circuit Court of Jefferson County, they were separately tried *de novo.* Petitioners Shuttlesworth and Billups were again convicted by the court sitting without a jury, and sentenced, respectively, to 180 days hard labor and a $100 fine, and 30 days' hard labor and a $25 fine (S. 40).

The convictions were affirmed by the Court of Appeals of Alabama. The court stated, in the *Shuttlesworth* case, that "'[e]veryone who incites any person to commit a crime is guilty of a common law misdemeanor, even though the crime is not committed'" (S. 44). It also held (S. 44):

> There is no question of the restriction of any right of free speech or other assimilated right derived from the Fourteenth Amendment, since the appellant counseled the college students not merely to ask service in a restaurant, but urged, convinced and arranged for them to remain on the premises presumably for an indefinite period of time. There is a great deal of analogy to the sit-down strikes in the automobile industry referred to in *National Labor Relations Board* v. *Fansteel Metallurgical Corp.*, 306 U.S. 240.

In the *Billups* case, the Court of Appeals simply adopted the findings of fact and the legal conclusions set forth in the *Shuttlesworth* case (S. 67). On September 25, 1961, the Supreme Court of Alabama denied writs of certiorari in both cases, and on November 16, 1961, rehearings were denied (S. 46, 69).

5. PETERSON V. CITY OF GREENVILLE, NO. 71

a. Statutes Involved.—Section 31–8, Code of Greenville, South Carolina, 1953, as amended in 1958, provides:

> It shall be unlawful for any person owning, managing or controlling any hotel, restaurant, cafe, eating house, boarding house or similar establishment to furnish meals to white persons and colored persons in the same room, or at the same table, or at the same counter; provided, however, that meals may be served to white persons and colored persons in the same room where separate facilities are furnished. Separate facilities shall be interpreted to mean:
>
> (a) Separate eating utensils and separate dishes for the serving of food, all of which shall be distinctly marked by some appropriate color scheme or otherwise;
>
> (b) Separate tables, counters or booths;
>
> (c) A distance of at least thirty-five feet shall be maintained between the area where white and colored persons are served;
>
> (d) The area referred to in subsection (c) above shall not be vacant but shall be occupied by the usual display counters and merchandise found in a business concern of a similar nature;
>
> (e) A separate facility shall be maintained and used for the cleaning of eating utensils and dishes furnished the two races.

Petitioners were convicted of violating Section 16-388, Code of Laws of South Carolina, 1952, as amended in 1960, which provides:

> Any person:
>
> (1) Who without legal cause or good excuse enters into the dwelling house, place of business or on the premises of another person, after having been warned within six months preceding, not to do so or
>
> (2) who, having entered into the dwelling house, place of business or on the premises of another person without having been warned within six months not to do so, and fails and refuses, without good cause or excuse, to leave immediately upon being ordered or requested to do so by the person in possession, or his agent or representative,
>
> Shall, on conviction, be fined not more than one hundred dollars, or be imprisoned for not more than thirty days.

b. The Facts.—At about 11:00 a.m. on August 9, 1960, petitioners, ten Negro students, took seats at the lunch counter at the Kress department store in Greenville, South Carolina, and requested service (P. 1, 19, 36). The Kress store in Greenville is open to the general public; it has fifteen to twenty departments and sells over 10,000 items (P. 21). Negroes and whites are invited to purchase and are served alike, except that Negroes are not served at the lunch counter (P. 21).

When petitioners requested service at the lunch counter, they were told by a Kress employee, "I'm sorry, we don't serve Negroes" (P. 19, 36). Petitioners refused to leave, and G. W. West, the Kress

manager, directed that the police be called (P. 22).[29]

Captain Bramlette of the Greenville Police Department received the call to proceed to the Kress store (P. 7). He was told that there were young colored boys and girls seated at the lunch counter (P. 10). Captain Bramlette testified that he did not know the origin of the telephone call (P. 7, 10). When Captain Bramlette, with several city policemen, arrived at the store, he found two agents of the State Law Enforcement Division already present at the lunch counter (P. 7).[30] In the presence of the police officers, the lunch counter lights were turned off and manager West requested "everybody to leave, that the lunch counter was closed" (P. 19, 15).[31] At petitioners' trial, their counsel was denied permission to ascertain whether this request followed arrangement or agreement with the police (P. 23, 24–25). After

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[29] Doris Wright, one of the petitioners, testified that on an earlier occasion she had spoken to the Kress manager about the stores' policy of lunch counter segregation and was assured that charges would not be pressed against Negroes who sought service (P. 38).

[30] The South Carolina Law Enforcement Division was organized to assist local law enforcement officers. Officer Hillyer of the Division, present at the time of the incident, testified that his immediate superior is Chief J. P. Strom, who is directly under the authority of the Governor of South Carolina (P. 43).

[31] Petitioner Wright testified that the request to leave was made by the police and not by Mr. West (P. 37). She denied that Mr. West asked her or any of the other petitioners to leave (P. 41). When asked, "Of course, you are not in position to say whether or not Mr. West may have made a request to some of the other nine?" she replied, "Yes, I am, Mr. West, come from the back of the store, at the time we were being arrested and were told that the lunch counter was closed" (P. 41).

about five minutes,[32] during which petitioners had made no attempt to leave the lunch counter, Captain Bramlette placed them under arrest for trespassing (P. 19).[33] Store manager West did not request that petitioners be arrested (P. 16, 24).

White persons were seated at the counter when the announcement to close was made but none were arrested (P. 19). Mr. West testified that, when the lights went out, the white customers departed (P. 19). But a white customer testified that, at the time of the arrests, some white persons were still seated at the counter (P. 30–31). As soon as petitioners were removed by the police, the lunch counter was reopened (P. 23).

Manager West testified that he closed the counter because of local custom and because of the Greenville city ordinance requiring racial segregation in eating facilities (P. 23):

> Q. Mr. West, why did you order your lunch counter closed?
>
> A. It's contrary to local custom and it's also the ordinance that has been discussed.
>
> Q. Do I understand then further, that you are saying that the presence of Negroes at your lunch counter was contrary to customs?
>
> A. Yes, sir.
>
> Q. And that is why you closed your lunch counter?

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[32] There is some conflict in the record regarding the time lapse between the announcement that the counter was closed and the arrests (see P. 29, 37, 38, 45).

[33] Four other Negroes were also arrested but their cases were disposed of by the juvenile authorities (P. 7).

A. Yes, sir, that's right."[34]

The record is conflicting as to whether Captain Bramlette thought he was acting under the Greenville segregation ordinance or the State trespass law. At one point, the Captain testified that he did not have the city ordinance in mind when he went to Kress but was thinking of the recently passed State trespass statute (P. 11). When asked however, why he arrested petitioners, he said (P. 15):

> A. Under the State Law just passed by the Governor relative to sit-down lunch counters in Greenville, I enforced this order.
>
> Q. But the State Law that just passed and signed by the Governor in May doesn't mention anything about Negroes sitting at lunch counters, does it?
>
> A. It mentions sit-ins.

However, after refreshing his recollection, the Captain conceded that the new State law did not mention sit-ins (P. 15). He further testified as follows (P. 16–17):

> Q. Did the manager of Kress', did he ask you to place these defendants under arrest, Captain Bramlette?
>
> A. He did not.
>
> Q. He did not?
>
> A. No.
>
> Q. Then why did you place them under arrest?
>
> A. Because we have an ordinance against it.
>
> Q. An ordinance?

[34] Mr. West testified (P. 21) that the policy of following local custom was prescribed by Kress' headquarters.

A. That's right.

Q. But you just now testified that you did not have the ordinance in mind when you went over there?

A. State law in mind when I went up there.

Q. And that isn't the ordinance of the City of Greenville, is it?

A. This supersedes the order for the City of Greenville.

Q. In other words, you believe you referred to an ordinance, but I believe you had the State statute in mind?

A. You asked me have I, did I have knowledge of the City ordinance in mind when I went up there and I answered I did not have it particularly in my mind, I said I had the State ordinance in my mind.

Q. I see and so far this City ordinance which requires separation of the races in restaurants, you at no time had it in mind, as you went about answering the call to Kress' and placing these people under arrest?

A. In my opinion the State law was passed recently supersedes our City ordinance.[35]

Petitioners were tried and convicted in the Recorder's Court of Greenville before the City Recorder, sitting without a jury, of violation of the South Carolina trespass law and sentenced to pay a fine of one hundred dollars or serve thirty days in the city jail (P. 47). Petitioners appealed to the Greenville County Court, and their appeal was dismissed on

[35] Although the trial judge appears to have denied petitioners' motion to make the Greenville segregation ordinance a part of the record (P. 46–47), it nevertheless has been incorporated into the record (P. 49).

March 17, 1961 (P. 50). That court noted that the trespass statute was merely a reenactment of the common law which permits a property owner to order any person from his premises whether they be an invitee or an uninvited person and that the constitutionality of the statute was unquestioned (P. 50–51). The court rejected petitioners' contention that they had a right to be served (P. 52).

On November 10, 1961, the Supreme Court of South Carolina affirmed the judgment and sentences (P. 55). It held that the operator of a privately owned business may accept some customers and reject others on purely personal grounds, in the absence of a statute to the contrary (P. 58). The court also held that there was nothing in the record to substantiate a claim that petitioners were actually prosecuted under the Greenville segregation ordinance (P. 59). The Supreme Court denied rehearing on November 30, 1961 (P. 62).

ARGUMENT

INTRODUCTION AND SUMMARY

We believe it important at the outset to define, and if possible limit, the issue in these cases.

The Fourteenth Amendment provides:

> * * * nor shall any State * * * deny to any person within its jurisdiction the equal protection of the laws.

In the *Civil Rights Cases*, 109 U.S. 3, decided shortly after the adoption of the Fourteenth Amendment, this Court held that the Amendment drew a fundamental distinction between a State's denial of

equal protection of the laws and discrimination by private individuals, however odious. "It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the Amendment" (*id.*, p. 11).

For a century, this basic postulate has been consistently applied in the courts. This brief does not question its validity. On the one hand, a State cannot constitutionally prohibit association between Negroes and whites, be it in a public restaurant or elsewhere. On the other hand, to cite an example, if a private landowner should invite all of his neighbors to use his swimming pool at will and then request one of the invitees to leave because of his race, creed or color, the decision would be private and, however unpraiseworthy, not unconstitutional. Furthermore, we take it that there would be no denial of equal protection if the State made its police and legal remedies available to the owner of the swimming pool against any person who came or remained upon his property over his objection. For, in a civilized community, where legal remedies have been substituted for force, private choice necessarily depends upon the support of sovereign sanctions. In such a case, the law would be color-blind and it could not be fairly said, we think, that the State had denied anyone the equal protection of its laws.

With respect to these "sit-in" cases it has been argued most broadly that the requisite State action is to be found in the arrests by the police, the prosecutions and the convictions, and that since discrimi-

nation against Negroes resulted from this State action, it violates the constitutional guarantee of equal protection of the laws. Cf. Henkin, *Shelley v. Kraemer: Notes for a Revised Opinion,* 110 U. of Pa. L. Rev. 473. Our example of the private residence and swimming pool is to be distinguished (the argument runs, upon the ground that, although that case too would involve State action and thus raise a federal constitutional question if there was an arrest and prosecution, nevertheless, the owner's right of privacy should outweigh the neighbor's claim to be free from racial discrimination. Against this, the States will no doubt argue that the two cases are alike because the State does not deny equal protection of the law when it indiscriminately offers to support the decision of the private landowner without regard to the landowner's reasons.

We believe that this bro d issue need not, and should not, be decided in the cases at bar. We express no opinion upon it. We assume *arguendo* that in the absence of other grounds for holding the State responsible the principle invoked by the States is applicable to uninvited entrants upon business property, where the business is neither subject to a legal duty to serve the public (as in the case of inns and common carriers) nor owned or managed by one exercising sovereign functions. In our view, however, the principle is not applicable to the present cases.

One significant difference is that these cases do not involve in any substantial sense the landowner's privilege of deciding whom he will bar from his

premises and whom he will invite upon them as social guests or business visitors. In these cases the Negroes were invited into the store and were lawfully on the premises. In the *Lombard* case, for example, McCrory's Five and Ten Cent Store caters to the general public, both whites and colored, and even at the lunch counter restricted to white patronage there was no sign indicating the restriction. The situation was substantially the same in *Peterson, Gober* and *Shuttlesworth*. The all-white lunch room in *Avent* was expressly restricted to "invited guests," which perhaps impliedly excluded the petitioners in that case, but all other portions of the store were open to Negroes and their patronage was solicited without discrimination. The only real restriction, therefore, was a policy of refusing to allow white and colored to break bread together. Although this restriction can be cast in the language of the law of trespass by saying that the owner may revoke the consent to enter, the terminology cannot conceal the fact that the sole reason for revocation was petitioners' refusal to accept a stigma of social inferiority. While this circumstance may not directly bear upon the question of the States' responsibility, it plainly shows that no substantial claim to constitutional rights in private property is involved in these cases. Cf. *Marsh* v. *Alabama*, 326 U.S. 501, 505–507.[36]

[36] Also, Mr. Justice Frankfurter, concurring, said "And similarly the technical distinctions on which a finding of 'trespass' so often depends are often too tenuous to control [a] decision regarding the scope of the vital liberties guaranteed by the Constitution." 326 U.S. at 511. Cf. *Shelley* v. *Kraemer*, 334 U.S. 1, 22; *Barrows* v. *Jackson*, 346 U.S. 249, 260.

Still more important in the cases at bar, the States, which instituted the prosecutions, share the responsibility for the invidious discrimination, so that the State denial of equal protection does not depend upon the arrests and prosecution alone. In the *Avent, Gober* and *Peterson* cases, municipal ordinances required racial segregation in public eating places. In the *Shuttlesworth* case, petitioners were convicted of aiding and abetting Negroes to sit in lunch counters reserved for whites in a city where an ordinance required segregation in restaurants. In the *Lombard* case, the State's laws and policies, effectively and persistently implemented throughout the community, had a similar effect, albeit there was no ordinance in terms requiring the exclusion of Negroes from the establishment in question.

Accordingly, we submit that the only question now requiring decision is whether, judged against the background of the owner's willingness to serve Negroes in other parts of the stores, the States' influence upon the owner's decision to discriminate in serving food, through explicit segregation ordinances in four cases and through a general policy of promoting racial segregation in the fifth, was sufficient on these records to make the States' activities, taken as a whole, a denial of equal protection of the laws. If so, the resulting convictions must be reversed.

It is one thing for the State to enforce, through the laws of trespass, exclusionary practices which rest simply upon individual preference, caprice or prejudice. It is quite another for the State, exercis-

ing as it does immeasurable influence over individual behavior, to induce racial segregation and then proceed to implement the acts of exclusion which it has brought about. If the State, by its laws, actions, and policies, causes individual acts of discrimination in the conduct of a business open to the public at large, the same State, we believe, cannot be heard to say that it is merely enforcing, in even-handed fashion, the private and unfettered decisions of the citizens.

To sustain the judgments of conviction in the instant cases in the face of the segregation ordinances and official policies, the Court, we believe, would be obliged, at a minimum, to find (1) that the acts of discrimination were shown not to be a result of the State's laws and policies or of the actions of State officials and (2) that the petitioners, when ordered to leave the premises in question, were on notice that the proprietor was acting to assert his own rights, rather than in obedience to the State's unconstitutional command. In these cases, neither finding can be made. For aught that appears, the State, in each instance, laid the foundation for the criminal conviction by its own mandates of segregation.

I

THE CONVICTIONS OF THE PETITIONERS IN *Avent, Gober, Shuttlesworth* AND *Peterson* VIOLATE THE FOURTEENTH AMENDMENT BECAUSE IT MUST BE CONCLUDED THAT THE FORCE OF MUNICIPAL LAWS CAUSED THE PROPRIETORS TO DISCRIMINATE

While the petitioners in *Avent*, *Gober*, and *Peterson* were convicted of trespassing for refusing to leave racially segregated lunch counters, these cases

cannot be divorced from the fact that the allegedly criminal acts occurred in communities which had ordinances affirmatively requiring racial segregation at establishments where food is served. (The *Shuttlesworth* case, involving a charge of aiding and abetting the violation of Alabama's criminal trespass statute, turns on the same considerations which govern the *Gober* case.) The City of Durham, North Carolina (see *supra*, pp. 6–7),[37] the City of Birmingham, Alabama (see *supra*, p. 22), and the City of Greenville, South Carolina (see *supra*, pp. 35–36), all had ordi-

[37] In the *Gober* case, the Alabama Supreme Court held that the Birmingham ordinance was not properly pleaded and therefore was not before the court on appeal. This reasoning is plainly insubstantial, since it is well established that the Alabama courts can take judicial notice of municipal ordinances. See 7 Code of Alabama (1940), § 429(1); *Shell Oil* v. *Edwards*, 263 Ala. 4, 81 So. 2d 535; *Smiley* v. *City of Birmingham*, 255 Ala. 604, 605, 52 So. 2d 710; *Monk* v. *Birmingham*, 87 F. Supp. 538 (N.D. Ala.), affirmed, 185 F. 2d 859 (C.A. 5), certiorari denied, 341 U.S. 940. Therefore, the ordinance was properly before the Alabama courts and may be considered by this Court.

We recognize that the existence of the Durham segregation ordinance was not called to the attention of the courts below and that no argument based on that ordinance was advanced in the petition for certiorari in the *Avent* case. Nevertheless, on occasion, this Court has decided cases on a ground not raised below. See, *e.g.*, *Terminiello* v. *Chicago*, 337 U.S. 1. This practice is particularly appropriate where it furthers this Court's historic refusal to adjudicate far-reaching constitutional questions except where such adjudication is absolutely necessary to the decision. See, *e.g.*, the concurring opinion of Mr. Justice Brandeis in *Ashwander* v. *Tennessee Valley Authority*, 297 U.S. 288, 345–348. Accordingly, should this Court conclude that the existence of the segregation ordinances in

nances forbidding eating establishments from serving whites and Negroes on a nonsegregated basis. We submit that the decision of restaurant owners to discriminate under the compulsion of these ordinances constitutes State action in violation of the Fourteenth Amendment. From that, it necessarily follows that the arrest and conviction of persons for refusing to obey this decision to discriminate likewise violates the command of the Constitution.

Gober and *Peterson* requires reversal of the convictions in these cases, we believe that a similar result should follow in *Avent*. Such a reversal in *Avent* would avoid consideration of any new constitutional issues not already decided in *Gober* and *Peterson*.

If this Court should conclude that it ought not take judicial notice of the Durham ordinance in deciding the case on the merits and that the constitutional issues raised, absent the ordinance, go substantially beyond anything required to be decided in the companion cases, it may wish to consider two other dispositions of the *Avent* case. One would be to remand the case to the Supreme Court of North Carolina for further consideration in the light of the decisions in any cases in which the segregation ordinances were given decisive significance. That court's rule with respect to judicial notice (see *Fulghum* v. *Town of Selma*, 238 N.C. 100, 76 S.E. 2d 368, 371; *State* v. *Clyburn*, 247 N.C. 455, 101 S.E. 2d 295, 300) might properly be affected by awareness of possible constitutional implications. And this Court has authority to "require such further proceedings to be had as may be just under the circumstances." 28 U.S.C. 2106. The other course would be to consider whether the writ was providently granted in the *Avent* case. The well-established practice of refusing to decide difficult constitutional issues upon an inadequate record or in cases that do not require their decision would seem equally applicable to cases in which the constitutional issue is raised only because one of the parties failed to take advantage of another available defense. Cf. *Rice* v. *Sioux City Memorial Park Cemetery, Inc.*, 349 U.S. 70.

A. A MUNICIPAL ORDINANCE WHICH REQUIRES RACIAL SEGREGATION IN RESTAURANTS VIOLATES THE FOURTEENTH AMENDMENT.

The municipal ordinances involved in these cases are clearly unconstitutional. It is a fundamental principle of our constitutional system that the Fourteenth Amendment prohibits state-sanctioned racial segregation. This principle was recently applied to restaurants in *Turner* v. *City of Memphis*, 369 U.S. 350. There, a statute authorized the State Division of Hotel and Restaurant Inspection of the State Department of Conservation to issue "such rules and regulations * * * as may be necessary pertaining to the safety and/or sanitation of hotels and restaurants * * *" and made violation of such regulations a misdemeanor (*id.* at 351). The resulting regulation provided that "[r]estaurants catering to both white and negro patrons should be arranged so that each race is properly segregated" (*ibid.*). This Court left no doubt that such State-required racial discrimination was unconstitutional, stating (*id.* at 353):

> * * * our decisions have foreclosed any possible contention that such a statute or regulation may stand consistently with the Fourteenth Amendment. *Brown* v. *Board of Education*, 347 U.S. 483; *Mayor & City Council* v. *Dawson*, 350 U.S. 877; *Holmes* v. *City of Atlanta*, 350 U.S. 879; *Gayle* v. *Browder*, 352 U.S. 903; *New Orleans City Park Improvement Assn* v. *Detiege*, 358 U.S. 54. * * *

See also *Bailey* v. *Patterson*, 369 U.S. 31; *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715; *Morgan* v. *Virginia*, 328 U.S. 373; *Baldwin* v. *Morgan*, 287 F.2d 750 (C.A. 5).

B. THE STATE IS RESPONSIBLE FOR THE DECISION OF THE OWNERS OF A RESTAURANT TO DISCRIMINATE ON THE BASIS OF RACE WHEN THIS DECISION IS COMPELLED BY STATE LAW

1. If the owner of an establishment requests Negroes to leave a lunch counter reserved for whites because a State law requires the owner to maintain segregation, the prosecution of Negroes for criminal trespass for refusing to leave would be an implementation of the discriminatory State statute and would therefore violate the equal protection clause of the Fourteenth Amendment. While this Court has apparently never had occasion to pass directly upon the question, the lower courts have so held. Thus, in *Williams* v. *Howard Johnson's Restaurant*, 268 F. 2d 845, 847, the Court of Appeals for the Fourth Circuit indicated that "actions * * * performed in obedience to some positive provision of state law" acquire the coloration of the State and are governed by the broad egalitarian requirements of the Fourteenth Amendment. In *Flemming* v. *South Carolina Electric and Gas Co.*, 224 F. 2d 752, the Fourth Circuit held that the racial segregation of passengers by a bus company, as required by State law, constituted action under color of State law. Similarly, the Court of Appeals for the Fifth Circuit has held that "[t]he very act of posting and maintaining separate [waiting room] facilities when done by the [railroad] Terminal as commanded by these state orders is action by the state." *Baldwin* v. *Morgan*, 287 F. 2d 750, 755 (C.A. 5). It declared (*id.* at 756):

> * * * the State may not use race or color as the basis for distinction. It may not do so by direct action *or through the medium of others*

> *who are under State compulsion to do so.* * * *
> (Emphasis added.)

See also the earlier *Baldwin* v. *Morgan* case, 251 F. 2d 780, 789–790 (C.A. 5); *Boman* v. *Birmingham Transit Co.*, 280 F. 2d 531 (C.A. 5).[38]

The rule enunciated in the above decisions, we believe, is clearly correct. A person who engages in racial discrimination under influence of the State's coercive authority is in no sense acting independently. Rather, he is acting in compliance with the will of the State, and the effect of his action is to carry out the State's policy of discrimination. Consequently, the discriminatory action, while performed by a private person, is a reflection of the State's law and policy. The State has "insinuated itself" into the private decision and "place[d] its authority behind discriminatory treatment based solely on color * * *" in the most forceful manner available to it, by the compulsion of its penal laws. *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 725, 727.

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[38] And see *Williams* v. *Hot Shoppes, Inc.*, 293 F. 2d 835, 845, 846 (C.A. D.C.) (Judges Bazelon and Edgerton dissenting):

"If a state statute affirmatively required restaurant owners to segregate their facilities or exclude Negro patrons, conduct of the restaurant owners caused solely by the compulsion of such a statute would be state action and would give rise to a claim for relief under [42 U.S.C.] § 1983. * * * When otherwise private persons or institutions are required by law to enforce the declared policy of the state against others, their enforcement of that policy is state action no less than would be enforcement of that policy by a uniformed officer."

The majority opinion in *Hot Shoppes* did not reach this question.

Indeed, if actions compelled by statute are not considered State action, decisions of this Court proscribing State-imposed racial segregation (see *supra*, p. 48) may be largely circumvented. For the result is that State laws compelling private persons or organizations to discriminate are enforced through parallel statutes—like the trespass and criminal mischief statutes involved here. It may be argued that no businessman is bound to discriminate because, if he disobeys a State law which commands discrimination, he can challenge the constitutionality of the statute under which he has been convicted—if need be, in this Court. But a criminal law, with the power of the State behind it, has, until it is repealed, a powerful effect of its own. Ordinary citizens do not know that a particular law is not enforced or is unconstitutional, and, even if they know, they do not lightly disregard it. In any event, regardless of the number of people who act under compulsion of a State segregation statute which is unconstitutional and therefore unenforceable, certainly in the case of those who do respond to the compulsion the consequence is an implementation of the statutory command. The use of the State's criminal law to arrest and convict Negroes for activities which, except for unconstitutional State segregation statutes, would be entirely legal—because the restaurateur would not discriminate—is surely unconstitutional.

2. We have shown that, if a restaurateur excludes Negroes because of a State statute, the State cannot convict Negroes for trespass for entering the restau-

rant. In none of these cases, we recognize, does the record contain an express and specific affirmative showing that the coercive force of the segregation ordinance was the sole reason for the proprietor's refusal to serve the various petitioners. In *Peterson* the proprietor testified that he refused service because of local custom *and* the segregation ordinance of Greenville. In *Avent* the ordinance is not mentioned in the record, but the manager acted in accordance with local custom and for reasons of "public safety." The *Gober* case presents five pairs of convictions. Petitioners Gober and Davis were excluded because the proprietor felt that it would be against the law to serve them. The records in the four other trials in the *Gober* case do not record the motivation of the various proprietors.[39] In *Shuttlesworth*, the petitioners were convicted of aiding and abetting the violations of the trespass statute involved in the *Gober* case. Under Alabama law, as stated by the Alabama Court of Appeals in this case, the validity

[39] In the *Gober-Davis* trial, petitioners' attempt to secure further evidence concerning the relationship of the ordinance and the decision to discriminate was foreclosed by the rulings of the trial court that this line of inquiry was incompetent (see the Statement, *supra*, pp. 29–30). Since *Gober-Davis* was the first of a series of five trials before the same state trial judge, further efforts in the four later cases to raise the same issue would have been futile, as is shown by the court's ruling in *Parker-West* that a similar line of inquiry was impermissible. Thus, while no effort was made in the *Hutchinson-King*, *Sanders-Westmoreland*, or *Walker-Willis* trials to raise an issue concerning the segregation ordinance, it is fair to say that all the petitioners in *Gober* were denied an opportunity to show that the restaurateurs' decisions to discriminate were based on the Birmingham ordinance.

of the convictions depends on whether they were inciting persons to commit a crime. There is no evidence in the *Shuttlesworth* record as to the motivations of the proprietors of the establishments where the "sitting-in" occurred.

Upon each of these records the only permissible inference is that the local ordinance was such a substantial factor in the proprietor's decision that the State must share in the responsibility for the discrimination to the same extent as if the record showed that the decision of the restaurateurs to discriminate was based solely upon State law. It is not necessary that the discrimination be solely the result of the State's activities. It is enough that the State in any of its manifestations has become involved in the discrimination. See *Burton* v. *Wilmington Parking Authority*, 365 U.S. 715, 722. See also pp. 59–63 *infra*.

We base our submission that the only permissible inference upon these records is one of substantial State responsibility for the proprietor's discrimination upon three lines of reasoning.

First, where State law requires racial segregation in all eating places and the proprietors uniformly comply, the average individual proprietor would never reach the question whether he would discriminate if left to a judgment uninfluenced by the State; and this seems true whether the owner is conscious or unconscious of the reasons for his conduct. The normal inference to be drawn from the existence of the ordinance, therefore, is that it caused the discrimination; and the State would then have to overcome the infer-

ence by showing that the decisions of the proprietors were wholly uninfluenced by the compulsion of an existing State law.

Second, to the extent that the records in these cases are unclear as to the motivation of the proprietors, the States had the burden of removing the ambiguity because the States themselves created it. It is a familiar principle of general applicability in our law that the party responsible for a wrong must "disentangle the consequences for which it was chargeable" or bear the responsibility for the whole. *National Labor Relations Board* v. *Remington Rand Inc.,* 94 F. 2d 862, 872. The question whether the restaurateurs were moved to act as they did because of the coercive effect of the segregation statutes would not exist except for the fact that the States passed and retained statutes which compel racial segregation and therefore violate the Fourteenth Amendment. It is clear, as we have seen, that if the proprietor discriminates as a result of the compulsion of the State, this constitutes State action. On the face of it, the decisions of the restaurateurs to discriminate were made under compulsion of explicit State statutes. Assuming that a State would be heard to deny the coercive effect of its own ordinance, there is no showing in any of these cases that the State did not cause the exclusionary act of the proprietor. In each instance, therefore, the State has failed to establish an element essential to the constitutionality of the conviction.

Third, even if the States had shown that the proprietor's decision to discriminate was not caused by the compulsion of the municipal ordinances, these

convictions would have to be deemed invalid because it was not also made to appear that the petitioners knew that the proprietor's decision was a purely private choice. Where discrimination appears on its face to be invalid under the Fourteenth Amendment because it is compelled by a State law, Negroes should not be required to investigate the true motive of the restaurateur before entering the premises. In *Boynton* v. *Virginia*, 364 U.S. 454, this Court held that the Interstate Commerce Act forbids racial segregation of a restaurant in a bus terminal. A contention was made that there was no proof that the bus company owned or controlled the bus terminal or restaurant in it. The Court answered that "where circumstances show that the terminal and restaurant operate as an integral part of the bus carrier's transportation service for interstate passengers * * *, an interstate passenger need not inquire into documents of title or contractual arrangements in order to determine whether he has a right to be served without discrimination." *Id.* at 462–464. Thus, the Court held in *Boynton* that a Negro who is being discriminated against need not inquire into the precise facts when it appears that the discrimination violates the Interstate Commerce Act. It follows *a fortiori* that where, as in these cases, discrimination against Negroes on its face appears to violate the Fourteenth Amendment, the Negro need not ascertain the motives of the owner at the risk of suffering criminal sanctions.

If Negroes were required to ascertain the actual motives of the proprietors before seeking service at lunch counters or entering lunch rooms, their rights under the Fourteenth Amendment would be seriously abridged. These motives are frequently difficult, if not impossible, to ascertain, at the time the Negro desires service in a particular restaurant, especially when, as in most of these cases, chain stores are involved.[40] The situation is analogous to that in First Amendment cases where this Court has held that the State cannot pass statutes which, because of vagueness, or the burden of proof, or the lack of any requirement of scienter, have the indirect effect of discouraging freedom of speech even though in the particular case no protected right may have been invaded. *E.g., Smith* v. *California*, 361 U.S. 147; *Speiser* v. *Randall*, 357 U.S. 513; *Thornhill* v. *Alabama*, 310 U.S. 88; *Winters* v. *New York*, 333 U.S. 507; *Wieman* v. *Updegraff*, 344 U.S. 183. In these cases, too, the effect of the State convictions is to discourage the assertion of constitutional rights since the petitioners were not given notice of the facts necessary to determine whether their actions were constitutionally protected.

In the present cases it is unnecessary, we think, to go farther and consider whether the presumption that a State law requiring segregation in eating

[40] Negroes, it appears, are invited into these stores, and in other respects their trade is solicited on a non-discriminary basis.

places has played a significant part in the proprietor's decision can be overcome by testimony that the proprietor would have enforced segregation even if there were no current statute or ordinance. It can be argued with considerable force that a private person should not lose a power of choice which is otherwise his merely because the State or municipality has acted in an unconstitutional manner. We would submit, however, if the question had to be decided, that, whatever may be the right of a proprietor to assert in private litigation that his decision to segregate is the result of private choice rather than the State's command, the State cannot justify the prosecution as consistent with the Fourteenth Amendment upon the ground that its command directing segregation had no effective influence upon the proprietor, the police or the public prosecutor. In a criminal prosecution one cannot put the segregation statute or ordinance, the proprietor's decision and the prosecution for trespass in separate compartments. The order to segregate is too inconsistent with freedom of choice and the ways in which its existence may influence proprietors' decisions are too varied and too subtle to permit a State to defend a criminal prosecution which enforces racial segregation, upon the ground that the segregation resulted from private choice, unless the State has actually left both choices entirely open to proprietors.

The segregation ordinances are also related to petitioners' convictions for criminal trespass by another tie. The police normally exercise considerable dis-

cretion in their method of handling citizens' complaints about infractions of minor criminal laws such as the trespass statutes. Prosecutors have and exercise similar latitude in deciding whether to institute criminal proceedings; and the judge has wide discretion in his disposition of the case. A State which has current laws requiring racial segregation in public eating places interjects an official discriminatory bias into all these decisions which is certainly relevant in deciding whether a prosecution for criminal trespass is so closely related to the discriminatory ordinances as to be part and parcel of the same State denial of equal protection of the laws.

II

ALTHOUGH IN THE LOUISIANA CASE THE STATE ADDRESSED NO EXPLICIT STATUTORY COMMAND TO RESTAURATEURS, AS SUCH, TO SEGREGATE THEIR CUSTOMERS, IT APPEARS THAT THE STATE, BY ITS POLICIES AND BY ITS LAWS IN CLOSELY RELATED AREAS, EFFECTIVELY INDUCED THE PROPRIETOR'S ACTS OF DISCRIMINATION. SINCE THE CASE DOES NOT PERMIT A FINDING THAT THE PROPRIETOR WAS MERELY MAKING A PRIVATE DECISION UNINFLUENCED BY OFFICIAL PRESSURE, THE STATE IS CONSTITUTIONALLY FORBIDDEN TO IMPOSE CRIMINAL SANCTIONS WHICH IMPLEMENT THE DISCRIMINATION.

A. The argument just concluded advances the proposition that when a State expresses its policy by issuing a specific statutory command to segregate it bears a heavy responsibility for discriminatory conduct which conforms to the State's requirement and cannot be permitted to compound the injustice by imposing criminal sanctions upon the victims of the

discrimination. The question presented in *Lombard* v. *Louisiana* is whether the same principle governs when the State's segregation policy is not embodied in an explicit statutory directive in terms requiring the proprietor of the particular establishment to discriminate against Negroes, but is, nonetheless, forcibly expressed and plainly evident in legislative declarations, laws in closely related areas, statements of public officials, and a long standing community-wide custom fostered and encouraged by the State.

We submit the same rule applies. For, in the absence of any contrary proof, in the latter case like the former it must be concluded that the exclusion of the Negro is the result of State policy rather than an unfettered individual decision. Notwithstanding the unsupported opinion of the Louisiana Supreme Court to the contrary (L. 146, 147, 148), an examination of the State and City policies and laws, together with the facts disclosed by the record, leads to the conclusion that Louisiana induced the acts of discrimination which support the prosecutions in *Lombard*; hence we submit these convictions are as invalid as those in the other cases.

To illustrate our point, we need go no further than the actual facts. Suppose, if you will, a State which, through its legislature, has proclaimed an overriding State policy of segregation; a State which, in pursuance of this policy, has enacted a panoply of prohibitions designed to inhibit contact between the races; a State which has vigorously and persistently enforced these prohibitions; a State which;

through the acts, conduct and statements of its public officials, has placed continuing stress upon the proposition that segregation is the required way of life; a State which, by the force of law and policy, brought to bear over the course of many decades and still continuing, has established a community-wide custom of segregation reaching virtually into every department of life. Suppose further that, though no specific enactment explicitly requires it, segregation is in fact uniformly practiced in public restaurants, in full conformity with the State's open and declared policies and with its encouragement and support. In these circumstances, does the absence of an express statutory command justify the conclusion that the State's prosecution of Negroes who seek to be served food despite the discriminatory practices followed by the proprietors of such an establishment is neutral and "color-blind"? Or, at least in the absence of a strong showing to the contrary, is one not driven, rather, to the conclusion that the State can not disclaim a measure of responsibility for the discrimination which it now seeks to implement through criminal sanctions?

Common sense requires an affirmative answer. Nor does this result call for the adoption of novel principles of law.

We begin with one certainty. The absence of an explicit statutory command does not foreclose the search for State action. The Fourteenth Amendment is not so narrowly confined. Just as the State acts in many other ways, so the Amendment looks

beyond the formal enactments of the State legislature. It notices State action in the rulings of judges, *Ex Parte Virginia*, 100 U.S. 339; *Shelley* v. *Kraemer*, 334 U.S. 1, in the edicts of governors, *Sterling* v. *Constantin*, 287 U.S. 378; *Cooper* v. *Aaron*, 358 U.S. 1; *Faubus* v. *Aaron*, 361 U.S. 197, affirming 173 F. Supp. 944, and in the decisions of all manner of subordinate local officials. *Virginia* v. *Rives*, 100 U.S. 313, 321; *Yick Wo* v. *Hopkins*, 118 U.S. 356; *Home Tel. & Tel. Co.* v. *Los Angeles*, 227 U.S. 278; *Niemotko* v. *Maryland*, 340 U.S. 268; *Pennsylvania* v. *Board of Trusts*, 353 U.S. 230; *Cooper* v. *Aaron*, *supra*. And, as the cases just cited make plain, discrimination by State officers is no less prohibited because it is accomplished without, or despite, the command of statutory law. See *Monroe* v. *Pape*, 365 U.S. 167, 171–172.

But the Amendment does not reach "official" acts only. The State is not insulated merely because the result is accomplished through persons interposed, however, "private" they may claim to be. The State can no more dictate discrimination in private institutions than it can segregate its own facilities. *Truax* v. *Raich*, 239 U.S. 33; *Buchanan* v. *Warley*, 245 U.S. 60; *Gayle* v. *Browder*, 352 U.S. 903, affirming 142 F. Supp. 707; *State Athletic Commission* v. *Dorsey*, 359 U.S. 533, affirming 168 F. Supp. 149; *Bailey* v. *Patterson*, 369 U.S. 31, 33; *Turner* v. *City of Memphis*, 369 U.S. 350. The constitutional right to equal treatment "can neither be nullified openly and directly by state legislators or state executive or judicial officers, nor nullified indirectly * * *" *Cooper* v. *Aaron*, *supra*, 358 U.S. at 17. Nor is it only when the State

explicitly dictates discrimination by others that their conduct "may fairly be said to be that of the States." *Shelly* v. *Kraemer, supra,* 334 U.S. at 13. See *Nixon* v. *Condon,* 286 U.S. 73; *Smith* v. *Allwright,* 321 U.S. 649; *Terry* v. *Adams,* 345 U.S. 461. State "participation", "whether attempted 'ingeniously or ingenuously,'" or "insinuation" in discriminatory activity is just as real when its involvment is "nonobvious." *Cooper* v. *Aaron, supra,* 358 U.S. at 4, 17; *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715, 725. Cf. *Public Utilities Comm'n* v. *Pollak,* 343 U.S. 451.[a] And, again, it does not matter through what branch of government, or whether formally or informally, the State encourages segregation by others. *Cooper* v. *Aaron, supra,* 358 U.S. at 17; *Terry* v. *Adams, supra,* 345 U.S. at 475 (opinion of Mr. Justice Frankfurter); *Barrows* v. *Jackson,* 346 U.S. 249, 254. As stated by this Court many years ago, "the prohibitions of the Fourteenth Amendment *,* * * have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes

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[a] See, also, *Muir* v. *Louisville Park Theatrical Association,* 347 U.S. 971, reversing and remanding 202 F. 2d 275; *Kerr* v. *Enoch Pratt Free Library of Baltimore City,* 149 F. 2d 212 (C.A. 4); *Department of Conservation & Development* v. *Tate,* 231 F. 2d 615 (C.A. 4); *City of St. Petersburg* v. *Alsup,* 238 F. 2d 830 (C.A. 5); *Derrington* v. *Plummer,* 240 F. 2d 922 (C.A. 5); *City of Greensboro* v. *Simkins,* 246 F. 2d 425 (C.A. 4); *Baldwin* v. *Morgan,* 287 F. 2d 750 (C.A. 5); *Lawrence* v. *Hancock,* 76 F. Supp. 1004 (S.D.W.Va.); *Jones* v. *Marva Theatres, Inc.,* 180 F. Supp. 49 (D.Md.); *Coke* v. *City of Atlanta, Ga.,* 184 F. Supp. 579 (N.D.Ga.). And see *Valle* v. *Stengel,* 176 F. 2d 697 (C.A. 3).

that action may be taken." *Ex Parte Virginia, supra,* 100 U.S. at 346–347.

The cases just cited, although they do not resolve the present issue, show the breadth of the concept of State action, which, as Mr. Justice Clark pointed out in *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715, 721–722, has from the day of the *Civil Rights* cases until *Cooper* v. *Aaron* embraced "State action of every kind * * * which denies * * * the equal protection of the laws" (109 U.S. at 11) and also "state participation through any arrangement, management, funds or property" (358 U.S. at 4). So long as the State has meaningfully "place[d] its authority behind discriminatory treatment based solely on color [it] is indubitably a denial by a State of the equal protection of the laws, in violation of the Fourteenth Amendment." *Burton* v. *Wilmington Parking Authority, supra,* 365 U.S. at 727 (dissenting opinion of Mr. Justice Frankfurter).

In short, the State is not insulated from responsibility under the Fourteenth Amendment merely because a private person commits the final act of invidious discrimination. The question, as Mr. Justice Clark has pointed out for the Court, is whether the State in any of its manifestations has, to some significant extent, become involved in the discrimination. *Burton* v. *Wilmington Parking Authority,* 365 U.S. 715, 722.

B. In light of these principles, we consider whether the act of discrimination which lies at the base of the prosecution of the petitioners in *Lombard* can be said to be "private", rather than State-induced.

1. The segregationist policy of Louisiana is reflected in its laws. The scheme is not haphazard. Almost every activity is segregated. Discrimination against the Negro literally begins with his birth and continues to his death, and beyond.

At the outset, the Negro is given a birth certificate which so identifies him. La. R.S. 40:244. He starts life on a segregated street. La. 33:5066–5068. See also, La. R.S. 33:4771. As a child he is segregated in parks, playgrounds, swimming pools, and other recreational activities. La. R.S. 33:4558.1. If taken to the circus, he must go in by a separate entrance. La. R.S. 4:5. Until very recently, he was relegated to all-Negro public schools. Former La. R.S. 17:331–334, 17:341–344 (repealed in 1960).[2] Even now, he may attend a segregated school in the upper grades. See *Orleans Parish School Board* v. *Bush*, August 6, 1962 (C.A. 5). Later on, he will be compelled to stay apart at all entertainments and athletic contests. La. R.S. 4:452. Mixed social functions are absolutely banned. La. R.S. 4:451. At work, he will eat separately and use separate sanitary facilities. La. R.S. 23:971–975. His voting registration is separately tabulated. La. R.S. 18:195. And, should he become a candidate for elective office, he will be identified by race on the ballot. La. R.S. 18:1174.1. He may not marry outside

[2] Despite the contrary rulings of the federal courts the statute books of Louisiana are not yet wiped clean of provisions designed to forestall effective desegregation of the public schools. See, *e.g.*, La. R.S. 17:107, 17:394.1, 17:395.1–4, 17:2801, *et seq.*, 17:2901, *et seq.*

of his race. La. Civil Code, Art. 94; La. R.S. 9:201. See, also, La. R.S. 14:79. If he is divorced, the court proceedings will reflect his color. La. R.S. 13.917, 13:1219.

Institutions for the blind and deaf are segregated. La. R.S. 17:10–12. So are homes for the aged and infirm. La. R.S. 46:181. And prisons also separate the races. La. R.S. 15:752, 15:854. See, also, La. R.S. 15:1011, 15:1031.

Finally, his death will be attested by a certificate identifying him by race. La. R.S. 40:246. And he will be buried, presumably in a segregated cemetery,[43] perhaps under a funeral policy which has been separately administered. La. R.S. 22:337; 22:345.

Significantly, in this pervasive scheme of segregation, there seems to be special emphasis on separate consumption of food and drink. Employers are required to segregate their employees during meals, even to the point of supplying different utensils for each race. La. R.S. 23:972. Likewise, at all places of public entertainment, separate water fountains must be provided. La. R.S. 4:452. And, in New Orleans at least, strict segregation is required in all establishments which serve beverages with more than one-half of 1 percent alcohol. New Orleans City Code, §§ 5–2(1), 5–61.1. All appearances suggest that the leg-

[43] While there appears to be no specific statute segregating cemeteries, the practice seems to be required, at least in all publicly owned cemeteries, by the recent constitutional provision compelling segregation in all State, parochial or municipal institutions. See La. Const. 1921, Art. X, § 5.1, as added by Act 630 of 1960, adopted November 8, 1960.

islative policy of Louisiana includes segregation of public restaurants and lunch counters.

The statute books give no false impression. While compulsory segregation is far from new in Louisiana, neither are the present laws mere vestiges of a forgotten past. Many of the statutes are recent. None are ignored as obsolete. On the contrary, what remained of a more generous era (see *Hall* v. *DeCuir*, 95 U.S. 485) was quickly erased from the books. One relevant example is the repeal in 1954, shortly after this Court's initial decision in *Brown* v. *Board of Education*, 347 U.S. 483, of the local "inkeeper" statute and a companion provision specifically banning "distinction or discrimination on account of race or color" in licensed "places of public resort." See former La. R.S. 4:3–4, repealed by Act 194 of 1954.

Where the State's segregation policy has given away, it has been almost invariably under the compulsion of federal court orders, and then only after most protracted litigation. See *Wilson* v. *Board of Supervisors*, 92 F. Supp. 986 (E.D. La.), affirmed, 340 U.S. 909 (State law school); *Tureaud* v. *Board of Supervisors*, 116 F. Supp. 248 (E.D. La.), reversed, 207 F. 2d 807, judgment of court of appeals stayed, 346 U.S. 881, vacated and remanded, 347 U.S. 971, affirmed, 225 F. 2d 434, reversed and remanded on rehearing, 226 F 2d 714, affirmed on further rehearing *en banc*, 228 F. 2d 895, certiorari denied, 351 U.S. 924 (State undergraduate and law school); *Morrison* v. *Davis*, 252 F. 2d 102 (C.A. 5), certiorari

denied, 356 U.S. 968, rehearing denied, 357 U.S. 944 (Buses and streetcars); *New Orleans City Park Improvement Ass'n* v. *Detiege*, 252 F. 2d 122 (C.A. 5), affirmed, 358 U.S. 54 (Municipal park); *Ludley* v. *Board of Supervisors of L.S.U.*, 150 F. Supp. 900 (E.D. La.), affirmed, 252 F. 2d 372, certiorari denied, 358 U.S. 819 (State colleges); *Dorsey* v. *State Athletic Commission*, 168 F. Supp. 149 (E.D. La.), affirmed, 359 U.S. 533 (Interracial sports contests); *Board of Supervisors of Louisiana State U.* v. *Fleming*, 265 F. 2d 736 (C.A. 5); (State university); *Louisiana State Board of Education* v. *Allen*, 287 F. 2d 32 (C.A. 5), certiorari denied, 368 U.S. 830 (State trade school); *St. Helena Parish School Board* v. *Hall*, 287 F. 2d 376 (C.A. 5), certiorari denied, 368 U.S. 830, further relief granted, 197 F. Supp. 649, affirmed, 368 U.S. 515 (Public schools); *East Baton Rouge Parish School Board* v. *Davis*, 287 F. 2d 380 (C.A. 5), certiorari denied, 368 U.S. 831 (Public schools). This Court is, of course, familiar with the course of the litigation involving the public schools of New Orleans. See *Bush* v. *Orleans Parish School Board*, 138 F. Supp. 337 (E.D. La.), leave to file mandamus denied, 351 U.S. 948, affirmed, 242 F. 2d 156, certiorari denied, 354 U.S. 921, denial of motion to vacate affirmed, 252 F. 2d 253, certiorari denied, 356 U.S. 969, further motion to vacate denied, 163 F. Supp. 701, affirmed, 268 F. 2d 78; *id.*, 187 F. Supp. 42, stay denied, 364 U.S. 803, affirmed, 365 U.S. 569; *id.*, 188 F. Supp. 916, stay denied, 364 U.S. 500, affirmed, 365 U.S. 569; *id.*, 190 F. Supp. 861, affirmed,

366 U.S. 212; *id.*, 191 F. Supp. 871, affirmed, 367 U.S. 908; *id.*, 194 F. Supp. 182, affirmed, 367 U.S. 907, 368 U.S. 11; *id.*, 204 F. Supp., 568, modified, 205 F. Supp. 893, modified and affirmed (C.A. 5), August 6, 1962.

As the State Legislature recently proclaimed, not only has Louisiana "always maintained a policy of segregation of the races," but "it is the intention of the citizens of this sovereign state that such a policy be continued." La. Act 630 of 1960, Preamble.

2. The statute books tell only a part of the story. Louisiana has a long tradition of racial discrimination, as is attested by the cases which have reached this Court. See, in addition to the cases already cited and those cited, *infra*, p. 70, *United States* v. *Cruikshank*, 92 U.S. 542; *Plessy* v. *Ferguson*, 163 U.S. 537; *Harmon* v. *Tyler*, 273 U.S. 668;[1] *Pierre* v. *Louisiana*, 306 U.S. 354; *Louisiana* v. *N.A.A.C.P.*, 366 U.S. 293. Even in areas where there is no specific statute, the custom of segregation persists. And, of course, customs often have a force akin to law. *Civil Rights Cases*, 109 U.S. 3, 16, 21; *Terry* v. *Adams*,

[1] "Louisiana's reluctance to abandon its tradition of segregation, even where this Court has ruled, is exemplified by the retention of the provision banning mixed communities in the 1950 codification of the laws still in effect, long after this Court's declaration that the statute was unconstitutional in *Harmon* v. *Tyler*. The Reporter for the revision notes that, since "[t]he state supreme court in its opinion [upholding the statute] had carefully distinguished or attempted to distinguish, the *Buchanan* case [*Buchanan* v. *Warley*, 245 U.S. 60, relied on by this Court]," and since this Court's ruling was "only a memorandum decision," the provision should be retained as still in force. See "Reporter's Notes" to La. R.S. 33:5066.

supra, 345 U.S. at 475 (opinion of Mr. Justice Frankfurter). Indeed, the Louisiana criminal courts are expressly enjoined to take judicial notice of extra-legal racial customs, presumably because they have legal relevance. See La. R.S. 15:422(6).

Specifically, a strict practice of segregation prevails in the service of food. As Mr. Justice Douglas noted in *Garner* v. *Louisiana*, 368 U.S. 157, 181 (concurring opinion):

> Though there may have been no state law or municipal ordinance that *in terms* required segregation of the races in restaurants, it is plain that the proprietors in the instant cases were segregating blacks from whites pursuant to Louisiana's custom. Segregation is basic to the structure of Louisiana as a community; the custom that maintains it is at least as powerful as any law. * * *.

The custom had not changed when the present "sit-in" occurred. Both the Mayor and Police Superintendent of New Orleans frankly stated that they knew of no desegregated restaurant in the City.[45]

But segregation in restaurants is no mere *private* custom. If it were, it would doubtless have long since ceased to be the uniform practice. See *Cooper* v.

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[45] We understand that since the granting of the petition in *Lombard* several department stores in New Orleans have desegregated their lunch counters. Of course, the partial desegregation of eating establishments at the present time does not disclose the situation when the discrimination at the base of these prosecutions occurred, two years earlier.

Aaron, supra, 358 U.S. at 20–21, 25, 26 (concurring opinion of Mr. Justice Frankfurter). It is actively supported by the outspoken policies of the State—policies so hardened that State employees are enjoined from advocating integration under penalty of losing their jobs. See La. R.S. 17:443, 17:462, 17:493, 17:523.

The State itself, apart from the enactment of compulsory legislation, sets the example. It segregates all of its own facilities. La. Const. 1921, Art. X, as amended 1960, § 5.1. It continues to discriminate in the electoral process. See *United States* v. *McElveen,* 180 F. Supp. 10 (E.D. La.), affirmed *sub nom. United States* v. *Thomas,* 362 U.S. 58; *United States* v. *Association of Citizens Councils of Louisiana,* 196 F. Supp. 908 (W.D. La.); *United States* v. *Manning,* 205 F. Supp. 172 (W.D. La.). See, also, *Hannah* v. *Larche,* 363 U.S. 420. Despite decisions in this Court, beginning with *Strauder* v. *West Virginia,* 100 U.S. 303, discrimination in grand jury selection persisted in New Orleans until at least 1954. See *Eubanks* v. *Louisiana,* 356 U.S. 584, 586. See, also, *Poret* v. *Sigler,* 361 U.S. 375. And efforts by Negroes to challenge segregation customs have been promptly met with prosecutions for breach of the peace. *Garner* v. *Louisiana,* 368 U.S. 157 (lunch counter customarily reserved for whites); *Taylor* v. *Louisiana,* 370 U.S. 154 (terminal waiting room customarily reserved for whites).

3. As indicated above, the inference that the State government causes and sustains the practice of segre-

gation in Louisiana restaurants seems unavoidable. In this instance, there were additional pressures by local officials.

Although the former New Orleans Mayor and the Superintendent of Police are men of moderation, whose utterances were restrained, their statements, quoted in full at pp. 12–15, *supra*, could not but harden the opposition to desegregation of lunch counters in the City. The timing of these official declarations was crucial.

It appears that, one week prior to the "sit-ins" here involved, the Superintendent of Police issued a public statement (*supra*, pp. 12–13), reprinted in the city's leading newspaper, which, in the context of Louisiana's laws and customs, must have been understood to condemn the efforts of the city's Negro citizens to achieve equality of treatment at lunch counter facilities not only by demonstrations but by any means. Terming the first "sit-ins" to have occurred in New Orleans "regrettable," the Superintendent claimed they were instigated by a "very small group" which did "not reflect the sentiments of the great majority of responsible citizens, both white and Negro, who make up our population." The Superintendent appealed to "mature responsible citizens of both races" to "exercise * * * sound, individual judgment, goodwill and a sense of personal and community responsibility." Parents of the demonstrators were asked "to urge upon these young people that such actions are not in the community interest." Perhaps most significant, the Superintend-

ent saw "no reason for any change whatever in the normal, good race-relations that have traditionally existed in New Orleans." In the existing environment this exhortation can hardly have been understood to be confined to illegal demonstrations; it obviously supported the notion that proprietors should continue to refuse service to Negroes, for the normal traditional pattern of race relations with respect to food service, as the Mayor and Superintendent testified, was that proprietors would not serve Negroes on an integrated basis.

Four days prior to the "sit-ins," the Superintendent's statement was buttressed by a statement issued by the Mayor (*supra*, pp. 13–15) also published in the press. The Mayor declared that he had "directed the superintendent of police that no additional sit-in demonstrations or so-called peaceful picketing outside retail stores by sit-in demonstrators or their sympathizers will be permitted." This command was not restricted to demonstrations involving refusals to leave after being requested to do so. It acknowledged no room for free private decisions by the owners of lunch counters, no opportunity for Negroes to seek service in the hope that the owners would abandon segregation. It was also a direct prohibition upon lawful peaceful picketing (Cf. *Thornhill* v. *Alabama*, 310 U.S. 88) designed to encourage proprietors to serve Negroes on an integrated basis. The Mayor stated that he would enforce his directions by invoking two recent enactments of the State legislature prohibiting acts which could "foreseeably disturb or alarm the

public." Finally, he demanded that "such demonstrations cease" in the "community interest."

The foregoing statements read in isolation might fairly be construed to deal only with "sit-in" demonstrations. However, their combined effect in the Louisiana context, we submit, was not only to discourage "sit-ins" but to condemn the goal of equality of service and any activity intended to persuade the proprietors of public eating-places to cease segregation. Their impact upon those who might otherwise have acceded to the demands for equality of treatment seems plain.

4. We return to the question whether the total body of State influences—the manifold current segregation laws and contemporaneous declarations of policy, the customs stemming therefrom and the declarations of the mayor and chief of police—should be found to have played the same decisive role in the proprietors' discrimination against petitioners Lombard *et al.* as the municipal ordinances were seen to play in the companion cases previously discussed. See pp. 50–59 *supra*. The situations differ in that the Louisiana laws did not literally require the segregation. They are the same in that on this record one can only conclude that Louisiana's official actions must have been effective inducing causes of the proprietor's choice. Under these circumstances, too, normal human experience teaches that the individual proprietor would never face the problem of forming a judgment uninfluenced by State policy. The State which enacts unconstitutionally discriminatory laws in areas so

closely related to segregation in public eating-places and which declares generally that racial segregation is the policy of the State has the same burden of disentangling its influence upon the proprietors' discrimination from other factors for which the State is not responsible. And there is the same burden to show petitioners' awareness that the segregation was the result of the proprietor's individual choice uninfluenced by State action, if indeed that were the truth.

In the present case, we are not left merely to inference and presumption. Far from overcoming the conclusion that the exclusionary practice stemmed from the State, the testimony of the store manager confirmed it. Although his testimony on this subject was curtailed at the trial (see *supra*, pp. 17–19), the manager pointedly declared (*supra*, pp. 16–17) that he refused petitioners service because of "local tradition, law and custom."

Louisiana's official segregation policies are also related to petitioners' convictions for criminal trespass by their inevitable effect upon the police, the prosecutors and the State courts. Louisiana's policy, like the segregation-in-public-eating-places ordinances discussed at pages 49–59 *supra*, interjected an official discriminatory bias into the decisions of the police in the handling of complaints, into the decision of the prosecutor as to whether to institute criminal proceedings and, quite possibly, into the sentence. This impact of the segregation policies in the criminal proceeding confirms our conclusion that the convictions violate

the Fourteenth Amendment because on these records they are inseparably part of the official State policy of denying Negroes equal protection of the laws.

In the present case, it is unnecessary to consider just how large a body of State laws would justify finding, in the absence of contrary proof, that the State is so involved in the proprietor's decision that it is barred from initiating a prosecution for criminal trespass. Each particular case must be individually decided by making a judgment upon the question of degree, and the smaller the body of State law the closer the case will fall to the dividing line. In the *Lombard* case the Louisiana statutes are current and the general State policy of segregation was declared by the legislature as recently as 1960. The problem that would arise if the statutes had been repealed and the private discrimination were only the result of community customs promoted by earlier State laws does not require consideration here. The currency and pervasiveness of the body of Louisiana's segregation laws and the plainness with which that policy is declared show that this case is well on the unconstitutional side of the dividing line.

5. We have argued above that the record utterly fails to overcome the strong inference that the proprietor's acts of discrimination were brought about by the State. Although the Louisiana Supreme Court has stated in its opinion (L. 147) that the decision to exclude Negroes was independently made by the store owner, we find no supporting evidence for this conclusion. The manager did testify that, so far as the

national chain was concerned, the determination was left to him. And, obviously, it was he who actually established the segregated eating accommodations and maintained them separate. But the courts below gloss over the manager's explanation why he acted as he did. So far as he was permitted to explain, he said he was following prevailing "local tradition, law and custom," as he interpreted it. Further cross-examination on this point was cut off. Clearly, this statement does not support the conclusion that he made a purely private decision.

We think this evidence unambiguous against the background already sketched. For, as we have said, having intruded so actively and so pervasively in the area of race relations, the State had to overcome the presumption that it participated in the act of discrimination at the base of these prosecutions. And, certainly, Louisiana has not met that burden, at the trial or elsewhere. But the result here would not be different if the Court should disagree and hold that the shoe was on the other foot. For, if petitioners bore the burden of proving the State's involvement, they were at least entitled to an opportunity to make that showing. And, if they have failed to satisfy this Court, it is only because their efforts in this direction were summarily cut short.

As the court below confirms, petitioners "sought to introduce evidence to establish that the action of the manager of McCrory's was provoked or encouraged by the state, its policy, or officers * * *" (L. 146). But the trial court refused that evidence. To cite one example, during the questioning of the store manager,

petitioners' counsel asked: "Will you tell the court why you were not allowed to serve them?" (L. 109). After an objection by the prosecutor was sustained on the ground that the question was not material, defense counsel stated the purpose of his inquiry (L. 110):

> I think it is material, because if Mr. Graves [the restaurant manager] felt there was some State policy that prevented him from serving these defendants this is a clear state action. * * *

Nor is this an isolated instance. Consistently, during the preliminary hearing on the motion to quash and during the trial itself, the trial judge prevented inquiry as to why the restaurant discriminated (L. 23, 25, 26, 107, 108, 127–128). The court having imposed upon them the burden of proving the State's involvement, this curtailment of petitioners' attempt to show that the store's decision to discriminate was attributable to the State was clearly improper. It follows that the *Lombard* convictions would have to be reversed even if the burden of showing whether the State's active support of segregation actually influenced the proprietor was upon the petitioners rather than the State.

III

THE DECISION IN THESE CASES SHOULD NOT BE DETERMINED BY CONSIDERATIONS PERTINENT SOLELY TO RIGHTS AS BETWEEN THE PROPRIETORS AND PETITIONERS

We have considered thus far the issues as between the petitioners and the States, and have shown that upon these records it must be concluded that the

States were sufficiently responsible for the discrimination to make their total action in relation to the petitioners' sentences—the inducement to discriminate plus the prosecution, conviction and sentences—a denial of equal protection of the law. In other words, a State may not, consistently with the Fourteenth Amendment, both induce a proprietor to engage in racial discrimination and prosecute the victims for criminal trespass or a similar offense.

The question may be raised, what are the mutual rights and duties of the petitioners and proprietors in the context of an ordinance requiring, or State action strongly encouraging, racial segregation. It may be argued, in attack upon our position, that reversal upon the grounds we urge would require holding the proprietors to a duty to serve Negroes and denying them private right to exclude them for whatever personal reasons they chose, a result inconsistent with the preservation of the private freedom of choice, sustained in the *Civil Rights Cases* and our ensuing constitutional history. The Negroes' remedy, the argument would conclude, is by direct attack upon the unconstitutional ordinances and official segregation policies rather than the proprietors' private freedom to discriminate.

We believe that this line of inquiry need not be fully explored because a decision in the present cases upon the ground put forward in this brief need not determine the private rights as between proprietors of public eating places and Negroes seeking service.

In the first place, there is no need to decide here whether even a criminal prosecution would violate the Fourteenth Amendment if it were made to appear as a fact that the proprietor's discriminatory practice was not a result of State action but of a personal wish to discriminate which would have been indulged in the absence of the State laws. On the records before the Court, this is not the fact. Obviously, the decision, then, cannot affect rights in private litigation in which the fact is made to appear.

Second, the presumption that the State law has influenced the private decision—a presumption which operates against the State in a criminal prosecution—might not operate in the same fashion against the private owner. The State, having adopted unconstitutional segregation laws, has a duty to disentangle the consequences; it does not lie in the State's mouth, at least in the absence of clear proof, to say that the very discriminatory practices that it ordered or otherwise sought to induce were actually unrelated to the State's directions or encouragement. This reasoning, however, would not run against the individual proprietor and consequently, as between him and the Negro, the outcome of any litigation might be different.

Third, we submit that there is no reason, in the circumstances of these cases, why the ability of the State to prosecute must be exactly the same, both substantively and procedurally, as the right of private owners to refuse service and exclude the Negro who

insists upon service. It is one thing to say that a State which enacts a law requiring segregation in public eating places is guilty of denying Negroes equal protection of the laws not only when it enforces that statute against them, but also when it prosecutes them for criminal trespass because of the decision of those who are apparently obeying the statutory command. That conclusion follows because the segregation laws cannot be so rigidly separated from the criminal prosecution; the prosecution, at least until the contrary is clearly demonstrated, is not only State action but a consequence, and therefore part and parcel, of the concurrent denial of equal protection of the laws. It is quite a different thing, however, to deprive the owner of any property rights which he may independently wish to exercise, on the ground that the State has violated the Fourteenth Amendment. Because of this difference the disposition of these criminal cases need not affect the private rights of proprietors and those seeking restaurant service, and those rights would remain to be determined whenever the issue may arise.

Under the facts of these cases, there is no serious incongruity in suggesting that the proprietors have not necessarily lost their right of action or defense in private suits merely because the State is constitutionally barred from implementing their discrimination through the imposition of criminal sanctions. The problem, if any, is confined within a narrow compass, and it is curable. We espouse no broad

rule of constitutional law which would, in all cases, deny the storeowner who wished to discriminate among customers the aid of the State criminal law. That might be the result if it were held that a State violates the Fourteenth Amendment merely by arresting and prosecuting those who trespass upon segregated premises. But we present no such question. Our contention is that, in cases like those at bar, the arrests and prosecutions violate the Constitution because the State itself has been a party to the underlying discrimination. To regain its neutrality and remove the only barrier now urged against its action, it suffices if the State terminates its objectionable inducement of discriminatory practices.

In summary, we submit that when the State, by its current laws, actions, and policies, brings about individual acts of discrimination in the conduct of a business open to the public at large, it cannot impose criminal sanctions upon those who have been excluded, on the theory that it is merely implementing a private property right. Americans, both black and white, may stand upon a more fundamental right: The right that government shall deny to no man the equal protection of the laws.

CONCLUSION

For the foregoing reasons, the judgments of conviction in these cases should be reversed.

Respectfully submitted.

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